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THE TEXAS RULES OF EVIDENCE— A PROPOSED CODIFICATION

by

*Thomas Black**

THIS Article attempts to codify the Texas rules of evidence. In so doing, the organization and chronology of the Federal Rules of Evidence are followed; thus it is suggested that a copy of the federal rules be kept nearby for ready reference. When the federal rules conform to the Texas law the applicable federal rule is quoted without change in the text, and supporting Texas authority is cited and discussed in the comments and accompanying footnotes. When Texas law differs from the federal rules the text of the rule so reflects, and explanatory discussion and citation again are found in the comments and footnotes. The miscellaneous rules set out in article XI of the federal rules are not within the scope of this Article and have been omitted.

The purpose of this Article is to reflect, not to reform, the Texas law of evidence. Thus, in most instances the stated rules adhere to current Texas law, be it right or wrong. Any ideas for improvement are generally confined to the comments. At times, however, a zeal for improvement within the rule itself proves irresistible.

The frequent citation of Texas Courts of Civil Appeals cases that have been "refused n.r.e.," "dismissed w.o.j.," or have "no writ history" is with full awareness that they are less than persuasive authority. Nevertheless, for jurisdictional and other reasons¹ the Texas Supreme Court's coverage of the rules of evidence has not been complete and thus many "well accepted" rules have no better authority. Finally, Texas Court of Criminal Appeals opinions are also cited in support of rules. In the unfortunate instances in which civil and criminal rules differ an effort has been made to resolve, or at least to recognize, the conflict in the comments.

ARTICLE I—GENERAL PROVISIONS

Rule 101

SCOPE

These rules govern proceedings in all courts of Texas.²

Rule 102

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration,

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1. *Casualty Ins. Co. v. Salinas*, 160 Tex. 445, 448, 333 S.W.2d 109, 112 (1960) (supreme court's jurisdiction limited to "questions of law" and to "error[s] of substantive law"); TEX. REV. CIV. STAT. ANN. art. 1728 (Vernon 1962).

2. FED. R. EVID. 101, 102 do not involve substantive rules of evidence and, thus, are adopted without change in these rules. Whether rule 101 would apply to administrative tribunals is subject to debate and has not been considered by any Texas court.

elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.³

Rule 103

RULINGS ON EVIDENCE

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer in the form of bill of exception or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Fundamental error.* Nothing in this rule precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Comments

Rule 103(a)(1), supported by ample Texas authority, recognizes the need for "timely" objection in order to preserve error. An objection made after the answer is "timely" only if the objection is not apparent from the question, and a motion to strike must be made as soon as the objection becomes apparent.⁴

Texas requires that a specific ground accompany each objection,⁵ a requirement of easy application except when the objection is that the evidence is "immaterial, irrelevant and prejudicial."⁶ The last clause of rule 103(a)(1),

3. *Phillips v. State*, 511 S.W.2d 22 (Tex. Crim. App. 1974); *Lyles v. State*, 171 Tex. Crim. 468, 351 S.W.2d 886 (1961); *South Tex. Elec. Coop. v. Ermis*, 396 S.W.2d 955 (Tex. Civ. App.—Corpus Christi 1965, no writ); *Withers v. Tyler County Lumber Co.*, 326 S.W.2d 173 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.).

4. *South Tex. Elec. Coop. v. Ermis*, 396 S.W.2d 955 (Tex. Civ. App.—Corpus Christi 1965, no writ); *F.W. Woolworth Co. v. Ellison*, 232 S.W.2d 857 (Tex. Civ. App.—Eastland 1950, no writ); *Valdez v. O'Connor*, 17 S.W.2d 835 (Tex. Civ. App.—San Antonio 1929, no writ).

5. *Brown & Root, Inc. v. Haddad*, 142 Tex. 624, 180 S.W.2d 339 (1944); *Campbell v. Paschall*, 132 Tex. 226, 121 S.W.2d 593 (1938); *Spencer v. State*, 438 S.W.2d 109 (Tex. Crim. App. 1969).

6. In *Bridges v. City of Richardson*, 163 Tex. 292, 354 S.W.2d 366 (1962), the court stated that "immaterial and irrelevant" is normally too general to preserve error unless the evidence is in fact "irrelevant and immaterial." The court of criminal appeals is even stricter. *See, e.g., Vela v. State*, 516 S.W.2d 176 (Tex. Crim. App. 1974), in which the State offered evidence of the deceased's good character and the defense objected to it as being "irrelevant, immaterial and inflammatory." The court held the objection too general, finding that the defense should have said "improper character evidence." *See also Rich v. State*, 510 S.W.2d 596 (Tex. Crim. App. 1974); *Spencer v. State*, 438 S.W.2d 109 (Tex. Crim. App. 1969). In *Xanthull v. State*, 172

which allows for the absence of such specific ground when it is apparent from the context, is supported by dicta from several civil appeals opinions⁷ and appears to reflect the general consensus of modern Texas courts.

The language of rule 103(a)(2) is too broad to be literally supported by statements from Texas opinions but the spirit of the Texas cases hovers close by. Texas courts, however, have definitely required that the substance of rejected evidence be made a part of the record;⁸ hence, problems arise over how substantial the offer must be. The accepted Texas procedure requires that the evidence be set forth in a bill of exception, a procedure which, though no longer strangled in formality, is still recognized in Texas.⁹ A full statement by counsel in the record, outlining the substance of the proposed evidence, should be sufficient.¹⁰ The final clause of this rule, preserving error that "was apparent from the context within which questions were asked" finds support in a recent Texas Supreme Court opinion.¹¹ Cautious practitioners, however, should take care to resolve any doubts by use of the bill of exception.

Rule 103(b) is supported by provisions in civil and criminal procedural rules.¹² Rule 103(c) also can be inferentially supported by procedural rules¹³ although its provisions are so obvious that few advocates have dared to contend otherwise and, thus, little direct supportive authority exists. Finally, the concept of "plain error," embodied in Federal Rule 103(d), is universally accepted in Texas under the doctrine of "fundamental error."¹⁴

Rule 104

PRELIMINARY QUESTIONS

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Tex. Crim. 481, 358 S.W.2d 631 (1962), however, the court stated that a general objection is sufficient if the evidence is inadmissible for any purpose.

7. *Sternenberg v. Marshall*, 257 S.W.2d 312 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.); *Coca Cola Bottling Co. v. Tannahill*, 235 S.W.2d 224 (Tex. Civ. App.—Fort Worth 1950, writ dismissed); *Turner v. Hodges' Estate*, 219 S.W.2d 522, 524 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

8. *Galindo v. Garcia*, 145 Tex. 507, 199 S.W.2d 499 (1947); *Lyons v. State*, 503 S.W.2d 254 (Tex. Crim. App. 1973); *Mabry v. State*, 492 S.W.2d 951 (Tex. Crim. App. 1973); *Bell v. Hoskins*, 357 S.W.2d 585 (Tex. Civ. App.—Dallas 1962, no writ); *City of Houston v. Huber*, 311 S.W.2d 488 (Tex. Civ. App.—Houston 1958, no writ).

9. *Solis v. State*, 492 S.W.2d 561 (Tex. Crim. App. 1973); *Morris v. City of Houston*, 466 S.W.2d 851 (Tex. Civ. App.—Houston 1971, no writ); TEX. R. CIV. P. 372; TEX. CODE CRIM. PROC. ANN. art. 40.09 (Vernon 1966).

10. *Echols v. Wells*, 510 S.W.2d 916 (Tex. 1974); TEX. CODE CRIM. PROC. ANN. art. 40.09(6)(d) (Vernon 1966). *But see Davidson v. State*, 162 Tex. Crim. 640, 288 S.W.2d 93 (1956), in which the court found such a statement to be insufficient.

11. *Echols v. Wells*, 510 S.W.2d 916 (Tex. 1974).

12. TEX. R. CIV. P. 372(i); TEX. CODE CRIM. PROC. ANN. art. 40.09(7) (Vernon Supp. 1976-77).

13. TEX. R. CIV. P. 269(d); TEX. CODE CRIM. PROC. ANN. art. 38.22(b) (Vernon 1966) (limited to confessions and dying declarations).

14. *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265 (1957); *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947).

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* As specified in Art. 38.22(b), Texas Code of Criminal Procedure, hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on the admissibility of dying declarations shall also be so conducted, and hearings on other preliminary matters shall be so conducted when the interests of justice require or when an accused is a witness, if he so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Comments

Texas case law¹⁵ supports the first sentence of rule 104(a) as taken from the correlative federal rules. The second sentence, liberating the court from rules of evidence in making such preliminary determinations, does not have specific case support but does conform to accepted Texas practice. Similarly, Federal Rule 104(b) expresses commonly accepted Texas practice, although no specific support in case law or statute can be found.

Rule 104(c) departs from the federal rules by making specific reference to the statutory rule which requires such hearings.¹⁶ The second sentence of rule 104(c) cannot be supported by specific authority but a contrary rule is unimaginable. The safeguards to an accused expressed in rule 104(d) have specific support in Texas with reference to hearings on confessions,¹⁷ the subject matter undoubtedly comprising the bulk of preliminary hearings. The extension of this rule to encompass the defendant's testimony at any preliminary matter, though phrased broadly, does not flaunt any Texas case and is therefore retained.¹⁸

Rule 105

LIMITED ADMISSIBILITY

(a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of

15. *Ditto v. Ditto Inv. Co.*, 158 Tex. 104, 309 S.W.2d 219 (1958); *Mackey v. State*, 160 Tex. Crim. 296, 269 S.W.2d 395 (1954); *Rocha v. State*, 148 Tex. Crim. 237, 186 S.W.2d 267 (1945); *Ollok v. United Heat Treating Co.*, 318 S.W.2d 785 (Tex. Civ. App.—Fort Worth 1958, no writ); see TEX. CODE CRIM. PROC. ANN. art. 38.09 (Vernon 1966). See also *Huffman v. State*, 450 S.W.2d 858 (Tex. Crim. App. 1970), in which a witness's competency depended upon her common law marriage to the defendant. The court allowed her testimony but instructed the jury not to consider it if they found the marriage relationship existed.

16. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1966). Such a hearing is required by *Jackson v. Denno*, 378 U.S. 368 (1964).

17. See, e.g., *Lopez v. State*, 384 S.W.2d 345 (Tex. Crim. App. 1964).

18. The provisions of rule 104(e) enjoy obvious support in Texas as elsewhere. The rules covering the admissibility of such evidence for weight and credibility purposes are found in Articles IV and VI *infra*.

such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) When evidence referred to in paragraph (a) above is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.¹⁹

Rule 106

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence.

Comment

Article 38.24 of the Texas Code of Criminal Procedure has been substituted here for Federal Rule 106 because it better expresses both the general subject matter and the Texas law. The article also properly expresses the practice in civil cases.²⁰ This article has been interpreted by the Texas Court of Criminal Appeals to allow admission only of relevant matters contained in the additional act, declaration, conversation, or writing.²¹

ARTICLE II—JUDICIAL NOTICE

Rule 201

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* A court may take judicial notice, whether requested or not.

(d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a

19. Section (b) has been added to rule 105 to reflect better the Texas common law. *See, e.g.,* Blum Milling Co. v. Moore-Seaver Grain Co., 115 Tex. 144, 277 S.W. 78 (1925); Kaplan v. Goodfried, 497 S.W.2d 101 (Tex. Civ. App.—Dallas 1973, no writ); Fort Worth Hotel Co. v. Waggoman, 126 S.W.2d 578 (Tex. Civ. App.—Fort Worth 1939, writ dismissed judgment corrected).

20. Travelers Ins. Co. v. Creyke, 446 S.W.2d 954 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ).

21. *See, e.g.,* Roman v. State, 503 S.W.2d 252 (Tex. Crim. App. 1974).

criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Comments

This rule follows Federal Rule 201 without change. Section (a), concerning the scope of the rule, very wisely limits it to "adjudicative facts." As explained in the Advisory Committee's note, it is next to impossible to formulate a rule governing judicial notice of legislative facts.²² Subdivision (b), concerning the kinds of facts subject to judicial notice, is fully supported by Texas cases which generally recognize judicial notice of "all matters of science or common knowledge."²³ A substantial number of Texas cases also approve judicial knowledge of matters that are "capable of accurate and ready determination."²⁴ Texas courts also have the discretion to take judicial notice unilaterally as provided in Federal Rule 201(c).²⁵

The matters provided in subsections (d) through (g) of Federal Rule 201 have not been specifically covered by Texas appellate decisions. All of these provisions, however, are reasonable and, therefore, are retained. Some complaint has been made about the second sentence of subdivision (g) which allows a jury in a criminal case to reject judicially noticed facts;²⁶ but, as pointed out in the report of the House Committee on the Judiciary, this provision is probably required by the sixth amendment to the United States Constitution.²⁷ Moreover, the complaint is more theoretical than real for it is unlikely that a conscientious jury will find contrary to facts "not subject to reasonable dispute."

ARTICLE III—PRESUMPTIONS

Rule 301

PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by legislation or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

22. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS 10-13 (West 1975) [hereinafter cited as FEDERAL RULES].

23. *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778, 784 (Tex. Comm'n App. 1929, holding approved). See also *Harper v. Killion*, 162 Tex. 481, 348 S.W.2d 521 (1961).

24. *James v. State*, 546 S.W.2d 306 (Tex. Crim. App. 1977) (moon phases); *Parish v. State*, 523 S.W.2d 665 (Tex. Crim. App. 1975) (time of sunset on a certain day); *Rios v. State*, 162 Tex. Crim. 609, 288 S.W.2d 77 (1956) (population of cities and counties reported in the United States Census); *Parker v. Pan Am. World Airways, Inc.*, 447 S.W.2d 731 (Tex. Civ. App.—Dallas 1969, no writ) (value of foreign currency); *Buckaloo Trucking Co. v. Johnson*, 409 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1966, no writ) (certain commonly known, easily ascertainable, and indisputable facts); *City of Irving v. Bull*, 369 S.W.2d 60 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (census figures).

25. *Harper v. Killion*, 162 Tex. 481, 348 S.W.2d 521 (1961); *Buckaloo Trucking Co. v. Johnson*, 409 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1966, no writ).

26. Wood, *The Federal Rules of Evidence, A Brief Outline and Commentary*, 38 TEX. B.J. 535, 536 (1975).

27. FEDERAL RULES, *supra* note 22, at 16.

Comment

Although the Texas common law is replete with problems, inconsistencies, and exceptions²⁸ the accepted view of Texas civil cases regarding the effect of a presumption is consistent with Federal Rule 301, and is therefore retained without substantial change.²⁹

Rule 302

PRESUMPTIONS IN CRIMINAL ACTIONS AND PROCEEDINGS

In criminal actions and proceedings, the existence and effect of presumptions shall be governed by the provisions of Section 205 of the Texas Penal Code.³⁰

ARTICLE IV—RELEVANCY AND ITS LIMITS

Rule 401

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.³¹

Rule 402

RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by these rules or by other judicial or legislative authority. Evidence which is not relevant is not admissible.³²

Rule 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF
PREJUDICE, CONFUSION OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Comment

Texas courts have never expressly adopted the balancing procedure au-

28. 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 53 (2d ed. 1956). Additionally, the discussion in Lents, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329 (1974), is very instructive.

29. See the discussion and cases cited in 1 C. MCCORMICK & R. RAY, *supra* note 28, §§ 41-58. The only change made to the text of rule 301 was to change "Congress" to "legislature."

30. TEX. PEN. CODE ANN. § 2.05 (Vernon 1974) fully covers the subject of presumptions in criminal actions.

31. Rule 401 is adopted here because it reflects judicial interpretation of relevant evidence by Texas courts. Many Texas cases contain a definition of relevant evidence substantially similar to the federal rule. See, e.g., *Pittman v. Baladez*, 158 Tex. 372, 381, 312 S.W.2d 210, 216 (1958) ("[t]here must be some logical connection, either directly or by inference, between the fact offered and the fact to be proved"); *Knapp v. State*, 504 S.W.2d 421, 437 (Tex. Crim. App. 1973) (evidence is admissible if "it tends to prove the issue, or constitutes a link in the chain of proof, and it is not to be rejected though standing alone it might not justify a verdict").

32. Texas cases recognize both the admissibility of relevant evidence (see, e.g., *Lone Star Gas Co. v. State*, 137 Tex. 279, 153 S.W.2d 681 (1941); *Knapp v. State*, 504 S.W.2d 421 (Tex. Crim. App. 1973)), and the inadmissibility of irrelevant evidence (see, e.g., *Dallas Ry. & Terminal Co. v. Oehler*, 156 Tex. 488, 296 S.W.2d 757 (1956); *Eckels v. State*, 153 Tex. Crim. 402, 220 S.W.2d 175 (1949)).

thorized by Federal Rule 403. They follow it sub silentio, however, and often utilize a balancing process without express recognition of the rule.³³ Such is the process in cases where clearly relevant evidence of prior crimes³⁴ or prior claims³⁵ has been excluded. One Texas court went so far as to state that "testimony is *never* excluded" for reasons of prejudice and proceeded to justify its admission of the allegedly prejudiced evidence as though Federal Rule 403 were guiding its every thought.³⁶

The Texas Court of Criminal Appeals has come closest to conscious balancing. In a recent case it reiterated its belief that the proper test for determining the admissibility of any evidence is whether its probative value outweighs its inflammatory nature.³⁷ Accordingly, even without express authority, it would seem contrary to Texas law to reject or even modify Federal Rule 403.

Rule 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime as set forth in Articles 19.06 (homicide) and 21.13 (sex crimes) of the Texas Penal Code.

33. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951 (Tex. Civ. App.—Texarkana 1976, no writ); *Roberts v. Dallas Ry. & Terminal Co.*, 276 S.W.2d 575 (Tex. Civ. App.—El Paso 1953, writ ref'd n.r.e.).

34. *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965); *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972).

35. *San Antonio Traction Co. v. Cox*, 184 S.W.2d 722 (Tex. Civ. App.—San Antonio 1916, no writ).

36. *Joy v. Peacock*, 131 S.W.2d 1012, 1019 (Tex. Civ. App.—Dallas 1939), *judgmt set aside*, 153 S.W.2d 440 (Tex. 1941) (emphasis added). In *Hussmann v. Leavell & Sherman*, 20 S.W.2d 829, 832 (Tex. Civ. App.—El Paso 1929), *aff'd*, 32 S.W.2d 643 (Tex. Comm'n App. 1930, *judgmt adopted*), the court went through a balancing process which could serve as a model for rule 403, then ruined it all by finding that "a party cannot be deprived of the benefit of evidence which is relevant and material because it may also have a tendency to prejudice the adverse party in the eyes of the jury." In reversing on another ground the commission of appeals said: "We agree with the rulings of the Court of Civil Appeals on the other assignments presented." 32 S.W.2d at 645.

37. The only argument of significant strength that the State can make toward admissibility of said proof that appellant while intoxicated on an occasion approximately two and one-half years prior to the date of this offense pointed a pistol at the head of deceased's brother is that such was relevant to show the effect of alcohol upon appellant and her tendency toward belligerency and resort to firearms when under its influence. In other words, that such proof is relevant on the question of motive. Though said proof might be of some slight relevancy on said question, such is certainly not what we deem to be *material relevancy*. All evidence of a defendant's commission of collateral crimes has some slight relevancy toward the likelihood of his committing an alleged crime, and especially so where the collateral crime is similar in nature to the one charged against the accused. However, as stated by this Court in *Albrecht v. State* . . . , "The test for determining admissibility of any type of evidence is whether the probative value of such evidence outweighs its inflammatory aspects, if any." *Mallicote v. State*, 548 S.W.2d 42, 43-44 (Tex. Crim. App. 1977). See also *Cobb v. State*, 503 S.W.2d 249 (Tex. Crim. App. 1973); *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972).

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(4) *Punishment hearing.* Evidence of accused's prior criminal record, general reputation and character at a hearing on proper punishment as provided in Article 37.07, Section 3(a) of the Texas Code of Criminal Procedure.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.³⁸

Comment

The federal rule excluding character evidence finds support in both civil and criminal cases in Texas, and is, therefore, adopted as rule 404(a).³⁹ The exception set forth in rule 404(a)(1) regarding the accused's right to present evidence of his good character and the state's right to rebut same also reflects the federal rule and finds ample support in Texas case law.⁴⁰

The rule 404(a)(2) exception concerning the victim's character is controlled by the referenced sections of the Texas Penal Code. Under article 1258 of the old Texas Penal Code, the forerunner of article 19.06 of the present Code, there were additional requirements that there be evidence of aggression or threats by the victim and knowledge of the victim's bad character on the part of the defendant.⁴¹ These requirements, however, were based on express language in article 1258 that was omitted from present article 19.06. Texas courts should honor the plain legislative intent to allow "all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased"⁴² to be entered into evidence. Additionally, the state's right to introduce rebuttal evidence concerning the victim's character is limited to cases in which the accused has offered evidence on the subject or seeks to justify his actions on grounds of threats.⁴³

Rule 405

METHODS OF PROVING CHARACTER

(a) *Reputation.* In all cases in which evidence of character or a trait

38. The provisions of rule 404(b) are substantially supported by opinions of the Texas Court of Criminal Appeals. See *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972). See also *Jones v. State*, 376 S.W.2d 842 (Tex. Crim. App. 1964).

39. *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965); *Gant v. State*, 513 S.W.2d 52 (Tex. Crim. App. 1974); *Bell v. State*, 433 S.W.2d 443 (Tex. Crim. App. 1968); *Grant v. Pendley*, 39 S.W.2d 596 (Tex. Comm'n App. 1931, holding approved).

40. See *Hicks v. State*, 493 S.W.2d 833 (Tex. Crim. App. 1973), in which the court allowed the defendant to present evidence of good character, and *Lowe v. State*, 166 Tex. Crim. 116, 312 S.W.2d 382 (1958), in which the State was allowed to rebut the character evidence presented by the accused.

41. See, e.g., *Mahaffey v. State*, 471 S.W.2d 801 (Tex. Crim. App. 1971), cert. denied, 405 U.S. 1018 (1972).

42. TEX. PEN. CODE ANN. § 19.06 (Vernon 1974).

43. *Hatley v. State*, 533 S.W.2d 27 (Tex. Crim. App. 1976). Rules 607-609 adequately dispose of the matter of the admissibility of evidence supporting or attacking the character of a witness which is the subject of rule 404(a)(3). Additionally, TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1976-77) controls the admissibility of character evidence at a punishment hearing due to the presence of bifurcated trials in Texas.

of character of a person is admissible, proof is limited to testimony as to reputation in the community where such person resides or where he is best known. On cross-examination, inquiry is allowable as to whether the witness has heard of relevant specific instances of conduct on the part of the person.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. Such proof may be made by extrinsic evidence or by direct inquiry on cross-examination.

Comments

Rule 405(a) substantially changes the federal rule in deference to the Texas practice of limiting character evidence to evidence of reputation,⁴⁴ and of limiting inquiries on cross-examination to the "have you heard" type of interrogatories.⁴⁵ Although proof of character is seldom attempted in civil cases, the Texas law is in no way offended by the above quoted version of rule 405(a).⁴⁶ Federal Rule 405(b), allowing proof of specific instances of conduct in cases in which character is directly in issue, is supported by Texas cases, hence its inclusion in this proposed codification.⁴⁷ The final sentence makes clear that the "have you heard" formality does not apply when character is an essential element of the case.

Rule 406

HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Comments

There is a paucity of Texas cases on the subject matter of Federal Rule 406, particularly with respect to the routine practice of an organization. There is, however, persuasive authority favoring admission of trade custom,⁴⁸ thus inferring acceptance of routine practice when sufficiently established. Texas courts have gone farther than most states in admitting proof of individual habits when properly established.⁴⁹

The federal rule admits habit and routine practice "whether corroborated or not and regardless of the presence of eyewitnesses."⁵⁰ Texas case history appears to require the presence of an eyewitness, at least in cases where

44. *Smith v. State*, 414 S.W.2d 659, 661 (Tex. Crim. App. 1967) ("[t]he inquiry as to character must be limited to the general reputation of the person in the community of his residence or where he is best known"). See also *Gholson v. State*, 542 S.W.2d 395, 402-03 (Tex. Crim. App. 1976), in which the court held that inquiry as to one's opinion of a witness's character is not permitted.

45. *Vance v. State*, 365 S.W.2d 182 (Tex. Crim. App. 1963); *Edmund v. State*, 169 Tex. Crim. 637, 336 S.W.2d 946 (1960). See also *Wright v. State*, 491 S.W.2d 936 (Tex. Crim. App. 1973).

46. *Grant v. Pendley*, 39 S.W.2d 596 (Tex. Comm'n App. 1931, holding approved).

47. *Claiborne v. State*, 100 Tex. Crim. 322, 273 S.W. 260 (1925); *Moore v. Davis*, 27 S.W.2d 153 (Tex. Comm'n App. 1930, judgment adopted); *Shely v. Harvey*, 163 S.W.2d 839 (Tex. Civ. App.—San Antonio 1942, writ refused w.o.m.).

48. *Stanley v. Southern Pac. Co.*, 466 S.W.2d 548 (Tex. 1971).

49. See *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965), and cases cited therein.

50. FED. R. EVID. 406.

evidence of a deceased's habits is sought to be admitted in a wrongful death action.⁵¹ Texas cases make no mention of a requirement of corroboration. The above quoted phrase in the federal rules has been deleted in this codification as it does not reflect the mainstream of judicial thought in Texas.

Rule 407

SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Comments

The general exclusion of evidence of subsequent remedial measures when offered to prove negligence or culpable conduct is well recognized in Texas.⁵² The admission of such evidence as proof concerning other legitimate issues, such as to show the condition of the premises at the time of the accident, to rebut a claim of infeasibility of repair, to explain a photograph of the premises, or to rebut a claim that repair would not help the offending condition, has long been allowed by Texas courts.⁵³ Federal Rule 407, therefore, has been adopted without change in this instance.

Rule 408

COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiation. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comments

Although worded more elaborately than necessary, the basic policy of Federal Rule 408, rendering statements made during compromise negotia-

51. *Missouri K.T.R.R. v. McFerrin*, 156 Tex. 69, 291 S.W.2d 931 (1956). Annot., 28 A.L.R.3d 1293 (1969), indicates that the eye witness requirement applies only in wrongful death actions when habits of the deceased are offered. The *McFerrin* facts fit this limitation but the language of the opinion is much broader.

52. *Texas Trunk R.R. v. Ayres*, 83 Tex. 268, 18 S.W. 684 (1892); *Railway Express Agency v. Spain*, 249 S.W.2d 644 (Tex. Civ. App.—Austin 1952), *writ diss'd*, 152 Tex. 198, 255 S.W.2d 509 (1953); *S. Blickman, Inc. v. Chilton*, 114 S.W.2d 646 (Tex. Civ. App.—Austin 1938, no writ).

53. *St. Louis, A. & T. Ry. v. Johnston*, 78 Tex. 536, 15 S.W. 104 (1890); *Winnsboro Cotton Oil Co. v. Carson*, 185 S.W. 1002 (Tex. Civ. App.—Dallas 1916, no writ).

tions inadmissible, is well supported by Texas authorities.⁵⁴ There are also Texas cases admitting relevant portions of such negotiations for other purposes.⁵⁵ There is little or no support in Texas case law for the provision in the federal rule admitting "evidence otherwise discoverable" even though "presented in the course of compromise negotiations." The provision is retained, however, as it is inconceivable that Texas courts would allow a litigant to avoid the admission at trial of relevant, discoverable facts simply by admitting them during compromise negotiations.

Rule 409

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

(a) In a lawsuit being tried before a jury for damages for personal injuries which resulted from an occurrence which is also the basis for a claim for property damage and/or payment of medical expense, no evidence is admissible which informs the jury that the property damage claim or medical expense has been paid or settled.

(b) In any civil action in which a party or someone on his behalf, such as his insurer, has made an advance payment prior to trial, any evidence of or concerning the advance payment shall be inadmissible at the trial on liability or damages in any action brought by the claimant, his survivor, or his personal representative to recover damages for personal injuries or related damages, for wrongful death of another, or for property damage or destruction.⁵⁶

Rule 410

INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. A plea of nolo contendere may not be used against the party making it as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Comments

Federal Rule 410 has been altered here to conform to Texas law on pleas of nolo contendere,⁵⁷ and to eliminate an ambiguity in the federal rule which

54. *Sullivan v. Missouri K.T. Ry.*, 110 Tex. 360, 220 S.W. 769 (1920); *Krenek v. South Tex. Elec. Coop.*, 502 S.W.2d 601 (Tex. Civ. App.—Corpus Christi 1973, no writ).

55. See, e.g., *Travelers Ins. Co. v. Barrett*, 366 S.W.2d 692 (Tex. Civ. App.—El Paso 1963, no writ) (settlement negotiations admitted to refute claim of undue delay). One recent opinion even has allowed proof of an admission of liability made during negotiations. See *Spiritas v. Robinowitz*, 544 S.W.2d 710 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

56. The provisions of art. 3737f, Texas Rules of Civil Procedure and of § 3 of art. 3737g, Texas Rules of Civil Procedure, have been substituted for the federal rule in this area. TEX. REV. CIV. STAT. ANN. arts. 3737(f), (g) (Vernon Supp. 1976-77). Sections 1 and 2 of subsection (g) supplement the text with relevant definitions and statements of coverage. *Id.*

57. TEX. CODE CRIM. PROC. ANN. art. 27.02(5) (Vernon Supp. 1976-77).

literally provides that a plea of *nolo contendere* is not admissible even in the proceeding in which it is entered. This literal inconsistency is plainly contrary to congressional intent, will never enjoy judicial acceptance, and, therefore, has been removed in this Texas codification. It is submitted that this vestige of poor draftsmanship should also be removed from the federal rule. The Texas rule with respect to the inadmissibility of offers to plead guilty conforms to the correlative portion of Federal Rule 410.⁵⁸ Although no Texas case authority can be found, it may be presumed that this rule would extend to offers to plead *nolo contendere*.

Also, Texas courts apparently have not decided the question of the admissibility of withdrawn pleas of guilty, or of *nolo contendere*, either in civil cases or in the criminal proceeding in which the plea was entered.⁵⁹ By analogy to civil procedure, such withdrawn guilty pleas would be admitted as are superseded pleadings in civil cases.⁶⁰ Strong policy considerations differentiate withdrawn guilty pleas from superseded civil pleadings,⁶¹ however, and in deference to such considerations the federal rule prohibiting admission of withdrawn guilty pleas has been retained in the absence of contrary Texas statute or decision.⁶²

Rule 411

LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

Comments

Texas cases approve the exclusion of evidence of liability insurance or the lack of it,⁶³ but admit the existence of insurance when offered for other purposes, such as to explain the delay of the plaintiff in presenting the claim,⁶⁴ to show agency,⁶⁵ to show ownership and control,⁶⁶ or to show bias and interest of a witness.⁶⁷ A requirement that matters such as agency and

58. *Stafford v. State*, 125 Tex. Crim. 174, 67 S.W.2d 285 (1934); *Dean v. State*, 72 Tex. Crim. 274, 161 S.W. 974 (1913).

59. Annot., 86 A.L.R.2d 326, 332 (1962), describes the *Dean* case as "frequently cited as authority re withdrawn pleas." According to *Shepard's Citator*, however, *Dean* has only been cited once and that was in *Stafford v. State*, 125 Tex. Crim. 174, 67 S.W.2d 285 (1934), involving an offer to plead guilty.

60. *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292 (1956).

61. See C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 265 (2d ed. 1972).

62. This represents a tightening up of the federal rule as originally passed. See *FEDERAL RULES*, *supra* note 22, at 38-40.

63. *Dennis v. Hulse*, 362 S.W.2d 308 (Tex. 1962); *Southland Greyhound Lines v. Cotten*, 126 Tex. 596, 91 S.W.2d 326 (1936).

64. *West Tex. State Bank v. Tri-Service Drilling Co.*, 339 S.W.2d 249 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.).

65. *Conner v. Angelina County Lumber Co.*, 146 S.W.2d 1093 (Tex. Civ. App.—Beaumont 1941, no writ).

66. *Harper v. Highway Motor Freight Lines*, 89 S.W.2d 448 (Tex. Civ. App.—Dallas 1935, writ dism'd).

67. *Barton Plumbing Co. v. Johnson*, 285 S.W.2d 780 (Tex. Civ. App.—Galveston 1955, writ ref'd); *Aguilera v. Reynolds Well Serv.*, 234 S.W.2d 282 (Tex. Civ. App.—San Antonio 1950, writ ref'd).

ownership be disputed before proof of liability insurance is admissible has been added because it is doubtful that Texas courts would otherwise admit the proffered evidence.

ARTICLE V—PRIVILEGES

Rule 501

PRIVILEGES

(a) In addition to the guarantees in the Constitutions of the United States and of Texas establishing privileges against self-incrimination, the following privileges shall be recognized in Texas:

(1) The husband and wife privilege as provided in Article 3715, Vernon's Texas Statutes Annotated, and in Article 38.11, Texas Code of Criminal Procedure.

(2) The attorney-client privilege as provided in Article 38.10, Texas Code of Criminal Procedure.

(3) The clergyman-penitent privilege as provided in Article 3715(a), Vernon's Texas Statutes Annotated.

(4) The privilege concerning communications by drug abusers provided in Article 38.101, Texas Code of Criminal Procedure.

(b) Nothing in this rule shall affect any statute or judicial decision pertaining to the admission or exclusion of confessions or of evidence obtained as a result of searches and seizures in and on a defendant's person or premises.

Comments

Federal Rule 501 does not establish any specific privileges but simply refers generally to those existing under federal or state common law or statute.⁶⁸ The above rule embodies a catalogue of existing privileges under Texas law. Article 3715 of the Civil Statutes and article 38.11 of the Code of Criminal Procedure establish the husband-wife privilege in Texas. The latter is somewhat redundant and confusingly combined with provisions rendering spouses incompetent witnesses in criminal action. Although neither statute expressly so provides, Texas courts have abrogated the husband-wife privilege in most suits between spouses.⁶⁹

Article 38.10 of the Code of Criminal Procedure is the only statutory authority for the attorney-client privilege, but the civil courts have described its forerunner as "a statutory declaration of the common-law rule of evidence [that] applies to both criminal and civil cases."⁷⁰

The clergyman-penitent privilege provided by article 3715(a), Vernon's Civil Statutes varies the proverb "what the Lord giveth the presiding judge taketh away." Its final clause provides that "the presiding judge in any trial may compel such disclosure if, in his opinion, the same is necessary to a proper administration of justice."⁷¹

Article 38.101 of the Code of Criminal Procedure applies only to com-

68. See FED. R. EVID. 501.

69. *Fasken v. Fasken*, 113 Tex. 464, 260 S.W. 701 (1924); *Spearman v. State*, 68 Tex. Crim. 449, 152 S.W. 915 (1913). TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon Supp. 1976-77) lifts the spouse's incompetency in cases involving crimes against the other spouse or children, but does not expressly lift the privilege in such cases.

70. *Williams v. Williams*, 108 S.W.2d 297, 299 (Tex. Civ. App.—Amarillo 1937, no writ).

71. TEX. REV. CIV. STAT. ANN. art. 3715(a) (Vernon Supp. 1976-77).

munications made during or precedent to "voluntary treatment," thus leaving open the question of whether disclosures made during court-ordered treatment or examination are protected by the privilege against self-incrimination or any other privilege.

Rule 501(b) is simply an express disclaimer of any intention to meddle with principles of constitutional law.

ARTICLE VI—WITNESSES

Rule 601

COMPETENCY AND INCOMPETENCY OF WITNESSES

Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

- (1) insane persons and children as provided in Article 38.06, Texas Code of Criminal Procedure.
- (2) spouses in criminal proceedings under circumstances provided in Article 38.11, Texas Code of Criminal Procedure.
- (3) parties in actions by or against executors, administrators or guardians as provided in Article 3716, Vernon's Texas Statutes Annotated.

Comments

Rule 601 embodies the three statutory disqualifications of witnesses in Texas. First, the incompetency of insane persons and children as provided in article 38.06 of the Texas Code of Criminal Procedure. This disqualification is to be determined by the trial judge according to the statutory standards and procedures.⁷² Second, article 38.11 of the Code of Criminal Procedure disqualifies spouses as witnesses in criminal proceedings. The incompetency of spouses is lifted when they testify "for each other" and in certain cases involving offenses by one against the other or against the children.⁷³ Third, the Dead Man's Statute, codified in article 3716 of the Civil Statutes, operates to disqualify parties as witnesses in certain suits described in the statute.

Both civil and criminal statutes reject religious belief or the lack of it as a ground for incompetency.⁷⁴ Additionally, civil statutes expressly repeal any incompetency of convicted felons,⁷⁵ of parties to the suit, and of persons due to their race.⁷⁶ The Texas Code of Criminal Procedure also inferentially provides for the competency of witnesses in the aforementioned categories by stating that all witnesses except those described in articles 38.06 and 38.11 are competent to testify.⁷⁷

Rule 602

LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced

72. TEX. CODE CRIM. PROC. ANN. arts. 38.06, .09 (Vernon 1966).

73. *Id.* art. 38.11 (Vernon Supp. 1976-77).

74. TEX. REV. CIV. STAT. ANN. art. 3717 (Vernon 1926); TEX. CODE CRIM. PROC. ANN. art. 38.12 (Vernon 1966). *See also* TEX. CONST. art. I, § 5.

75. TEX. REV. CIV. STAT. ANN. art. 3717 (Vernon 1926).

76. *Id.* art. 3714.

77. TEX. CODE CRIM. PROC. ANN. art. 38.10 (Vernon Supp. 1976-77).

sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.⁷⁸

Rule 603

OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.⁷⁹

Rule 604

INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.⁸⁰

Rule 605

JUDGE AS WITNESS

The judge presiding at a trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Comments

Rule 605 admittedly is contrary to Texas law. Article 38.13 of the Texas Code of Criminal Procedure which provides that "the trial judge is a competent witness . . ."⁸¹ has been applied and approved in a d.w.i. case in which the trial judge was allowed to testify that he was the magistrate before whom the defendant was brought after arrest and that he believed the defendant was intoxicated.⁸² Two civil cases have indicated in dicta that the trial judge may testify as to any facts within his personal knowledge.⁸³ The federal rule, however, is favored over the above cited Texas authority which appears to violate the due process requirements of the Constitution.⁸⁴ Lastly, the second sentence of Federal Rule 605 is needed to protect counsel from appearing to oppose "truth and justice" before the jury.

78. The provisions of rule 602 have long enjoyed support in Texas. *See, e.g.*, *Texas & Pac. Ry. v. Reed*, 88 Tex. 439, 31 S.W. 1058 (1895).

79. Rule 603 is supported by TEX. CONST. art. I, § 5.

80. Rule 604 has substantial support in the provisions of TEX. REV. CIV. STAT. ANN. art. 3712(a) (Vernon Supp. 1976-77), TEX. R. CIV. P. 183, and TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon 1966).

81. TEX. CODE CRIM. PROC. ANN. art. 38.13 (Vernon 1966).

82. *Kemp v. State*, 382 S.W.2d 933 (Tex. Crim. App. 1964).

83. *Great Liberty Life Ins. Co. v. Flint*, 336 S.W.2d 434 (Tex. Civ. App.—Fort Worth 1960, no writ); *Conyer v. Burckhalter*, 275 S.W. 606 (Tex. Civ. App.—Dallas 1925), *writ dismissed*, 7 S.W.2d 73 (Tex. Comm'n App. 1928, judgment adopted).

84. What could be more unfair than for the trial judge to solemnly descend to the witness stand, displaying the halo of impartiality that bar association public relations has placed around his brow. Consider the scene from the juror's viewpoint: after entering the court room to the pomp and circumstance of "oyez, oyez!" and "everyone rise, please!" together with other ceremonies designed to super-dignify him, the judge takes the witness stand (would he submit to the oath? would he condescend to remove his robe? would everyone rise as he descends?) and proceeds to tell the adoring jury what the facts really are; then, after less than vigorous cross-examination by counsel, his honor would solemnly ascend to the bench, take up his gavel, and resume the role of impartial arbiter. If this is due process in a civil or criminal proceeding, then what is not?

Rule 606

COMPETENCY OF JUROR AS WITNESS

(a) *At the trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.⁸⁵

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.⁸⁶

Rule 607

IMPEACHMENT GENERALLY

(a) The credibility of a witness may be attacked by the opposing party by proof of bias, interest, inconsistent statements, traits of character affecting credibility, any impairment or disability affecting credibility, or by any other circumstance which the trial court believes would reasonably affect the credibility of the witness.

(b) A witness may also be impeached by the opposing party by cross-examination or extrinsic evidence contradicting the witness' testimony on matters directly in issue or matters affecting the witness' credibility, as provided in these rules, but a witness may not be impeached by contradiction on collateral matters unless in the opinion of the trial judge the impeachment evidence gives promise of exposing falsehood or should be admitted in the interests of justice.

(c) The credibility of a witness may not be attacked by the party placing him on the stand or by a party with like interests without a showing that such witness' testimony is injurious to said party's cause and that the nature of the witness' testimony surprised said party, and in no event may such party offer evidence of such witness' bad character.

Comments

The federal rules do not adequately cover the area of impeachment; thus, substantial additions have been included in rule 607. Specifically, only two of the common grounds for impeachment—bad character and inconsistent statements—are mentioned in the federal rules, and nothing is mentioned about support by proof of consistent statements of the witness. Such omissions admittedly simplify the rules. A complete codification, however, should inform litigants whether and how a foundation should be laid to

85. Rule 606(a) is merely a codification of common sense and enjoys support in Texas. *See, e.g.,* *Reis v. State*, 130 Tex. Crim. 541, 95 S.W.2d 700 (1936); *Gregory v. St. Louis Sw. Ry.*, 377 S.W.2d 847 (Tex. Civ. App.—Texarkana 1964), *rev'd on other grounds*, 387 S.W.2d 27 (Tex. 1965).

86. Rule 606(b) conforms to the general civil practice and the requirements of criminal procedure. *See Pope, The Mental Operation of Jurors*, 40 TEX. L. REV. 849 (1962). *See also* TEX. CODE CRIM. PROC. ANN. art. 40.03(7) (Vernon Supp. 1976-77).

impeach for bias, when and to what extent a witness can be contradicted, and when and how a litigant may support his witness' testimony. The additions here and those made in connection with rule 613 are attempts to fill these gaps reflecting the common law in Texas.

Texas authorities allow impeachment for bias, interest or prejudice,⁸⁷ inconsistent statements,⁸⁸ lack of character for veracity,⁸⁹ and for relevant impairments.⁹⁰ While the catch-all phrase contained in rule 607(a) above is not supported by specific Texas authority, no case authority suggests that the accepted forms of impeachment are exclusive.

Rule 607(b) reflects the Texas law concerning impeachment by way of contradiction. Rule 607(b) also reflects the fact that Texas courts are surprisingly rigid concerning contradiction on "collateral matters,"⁹¹ even by way of cross-examination.⁹² The final phrase in the rule is taken from a court of civil appeals opinion which states that "[t]he rule of admissibility of evidence of this nature [impeachment on collateral matters] should be liberal and the trial judge should have the discretion to receive any evidence which gives promise of exposing falsehood."⁹³ This, it is hoped, correctly reflects the Texas law.

Rule 607(c) is contrary to Federal Rule 607 which allows a witness to be attacked by any party, including the party calling him. The rule instead reflects current Texas law, which allows impeachment of a party's own witness⁹⁴ only upon a showing of surprise and injurious testimony.⁹⁵ The Texas Code of Criminal Procedure purports to allow impeachment of a party's own witness without a showing of surprise,⁹⁶ but the Court of Criminal Appeals nevertheless consistently exacts the requirement.⁹⁷ Article 38.28 of the Code of Criminal Procedure is the basis for prohibiting the impeachment of a party's own witness on grounds of bad character.

87. *Evans v. State*, 519 S.W.2d 868 (Tex. Crim. App. 1975); *Parsons v. State*, 102 Tex. Crim. 524, 278 S.W. 444 (1925).

88. *Smith v. State*, 520 S.W.2d 383 (Tex. Crim. App. 1975); *Birch v. Howard*, 435 S.W.2d 945 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

89. *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965); *Thrash v. State*, 482 S.W.2d 213 (Tex. Crim. App. 1972); *Garza v. Garza*, 109 S.W.2d 1079 (Tex. Civ. App.—San Antonio 1937, writ dism'd).

90. *Bouldin v. State*, 87 Tex. Crim. 419, 222 S.W. 555 (1920) (insanity); *Wren v. Howland*, 75 S.W. 894 (Tex. Civ. App. 1903, writ ref'd) (senility).

91. It is recognized that "collateral matters" are defined, if at all, only by negative inference, but this was the only method for defining the term if the article was ever to be finished.

92. *Gatson v. State*, 387 S.W.2d 65 (Tex. Crim. App. 1965); *Christie v. Brewer*, 374 S.W.2d 908 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); 1 C. MCCORMICK & R. RAY, *supra* note 28, § 683.

93. *Royal v. Cameron*, 382 S.W.2d 335, 342 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).

94. *Phlegm v. Pacific Employers Ins. Co.*, 453 S.W.2d 320 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); *Federal Underwriters Exch. v. Rattler*, 192 S.W.2d 942 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.).

95. *Morgan v. Stringer*, 120 Tex. 220, 36 S.W.2d 468 (1931); *Wall v. State*, 417 S.W.2d 59 (Tex. Crim. App. 1967); *Phlegm v. Pacific Employers Ins. Co.*, 453 S.W.2d 320 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

96. TEX. CODE CRIM. PROC. ANN. art. 38.28 (Vernon 1966).

97. *Williams v. State*, 521 S.W.2d 250 (Tex. Crim. App. 1975); *Wall v. State*, 417 S.W.2d 59 (Tex. Crim. App. 1967).

Rule 608

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) *Reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence of the reputation of such witness as to character for truthfulness or untruthfulness. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence nor inquired into on cross-examination.

(c) *Waiver.* The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Comments

Rule 608(a) excludes the "opinion" evidence concerning character for truthfulness that the federal rule allows because Texas courts permit inquiry only into the reputation of the witness for truthfulness or untruthfulness.⁹⁸ The provision allowing support of a witness by proof of good reputation only after the witness' character for truth has been attacked has long been the rule in Texas.⁹⁹ In determining when a witness' character for truth has been attacked in a manner justifying such support, Texas courts have exhibited considerable permissiveness, allowing such support after a showing of inconsistent statements¹⁰⁰ or of acts of misconduct.¹⁰¹ Mere contradiction of a witness' testimony through other evidence, however, does not ordinarily constitute an attack on the character of a witness sufficient to justify the introduction of support evidence.¹⁰²

Federal Rule 608(b) permits the court to allow inquiry into specific acts of misconduct short of conviction of a crime. Such inquiry is not allowed in Texas.¹⁰³ Therefore, rule 608(b) expressly prohibits evidence of or inquiry into specific acts of misconduct not resulting in a conviction. Finally, although Texas courts have not spoken on the proposition, the last paragraph of the rule follows Federal Rule 608 for it appears eminently reasonable that Texas courts, if faced with the question, will follow this common-sense codification.

Rule 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been finally convicted of a crime shall be

98. *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965); *Thrash v. State*, 482 S.W.2d 213 (Tex. Crim. App. 1972); *Garza v. Garza*, 109 S.W.2d 1079 (Tex. Civ. App.—San Antonio 1937, writ dismissed).

99. *International-Great N. Ry. v. Hailey*, 9 S.W.2d 182 (Tex. Civ. App.—Waco 1928), cert. denied, 280 U.S. 558 (1929).

100. *Robertson v. State*, 81 Tex. Crim. 378, 195 S.W. 602 (1917).

101. *Garcia v. State*, 113 Tex. Crim. 380, 22 S.W.2d 658 (1929).

102. *Texas & Pac. Ry. v. Raney*, 86 Tex. 363, 25 S.W. 11 (1894); *Livestock Feeder Co. v. Few*, 397 S.W.2d 297 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.).

103. *Christie v. Brewer*, 374 S.W.2d 908 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); TEX. CODE CRIM. PROC. ANN. art. 38.29 (Vernon 1966).

admitted if elicited from him on cross-examination or established separately by public record or both, but only if the crime (1) constituted a felony under the law under which he was convicted, or (2) constituted a misdemeanor involving moral turpitude, or (3) involved dishonesty or false statement.

(b) *Time limit.* Evidence of a conviction under this rule is not admissible unless the trial court determines that it was sufficiently recent in time to have some bearing upon the present credibility of the witness.

(c) *Pardon.* The fact that a final conviction, otherwise admissible under these rules, has been the subject of a pardon, does not render such conviction inadmissible, but the fact of the pardon is also admissible.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is not admissible under this rule.

(e) *Pendency of appeal.* Only final convictions are subject to proof hereunder; thus the pendency of an appeal from such conviction renders evidence of the conviction inadmissible.

Comments

Substantial alterations have been made in Federal Rule 609 to reflect Texas law correctly. First, the terminology in rule 609(a) describing the type of crime subject to proof has been changed to reflect the rule in criminal cases admitting proof of a felony or of a misdemeanor involving moral turpitude.¹⁰⁴ A different standard is imposed in civil cases, where proof only of crimes involving moral turpitude is allowed; even a felony is not an impeachable offense unless believed to involve moral turpitude.¹⁰⁵ The rule in criminal cases has been favored here because it is simpler and more precise. The final classification of crimes involving dishonesty or false statement is probably redundant; usually such a crime is either a felony or a misdemeanor involving moral turpitude.¹⁰⁶

Another change in rule 609(a) involves the manner of presentation of the conviction. The federal rule appears to require that the conviction must be elicited from the witness or established by public record *during cross-examination*. The Texas courts allow evidence to be solicited either on cross-examination or by separate proof of the public record, or both.¹⁰⁷ Lastly, the federal rule provision allowing the trial judge to reject the conviction upon finding that its probative value is outweighed by its prejudicial effect to the defendant has been deleted. It is doubtful that Texas trial judges have such discretion other than by applying the remoteness factor set forth in rule 609(b), or possibly by "balancing" under rule 403, above.

The arbitrary ten year cut-off in Federal Rule 609(b) has been revised to

104. *Rivas v. State*, 501 S.W.2d 918 (Tex. Crim. App. 1973); *Stephens v. State*, 417 S.W.2d 286 (Tex. Crim. App. 1967).

105. *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649 (Tex. 1970); *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965).

106. This is implied in the opinion of the court in *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965).

107. *Martini v. State*, 371 S.W.2d 387 (Tex. Crim. App. 1963) (approves use of both the record and cross-examination); *Texas Employers' Ins. Ass'n v. Curry*, 290 S.W.2d 767 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.) (approves use of records); *Bernard's, Inc. v. Austin*, 300 S.W. 256 (Tex. Civ. App.—Dallas 1927, writ ref'd) (approves use of cross-examination).

adopt the more flexible "remoteness" standard followed in Texas.¹⁰⁸ In determining whether a conviction is remote, the judge is to look to the date of the witness' release from prison rather than to the date of conviction. The judge may reach further back in time if intervening convictions indicating lack of rehabilitation have occurred.¹⁰⁹ While Texas trial judges lack the express authority granted by the federal rules to accept or reject evidence of a conviction based on a judgment of its probative value measured against its prejudicial nature, the flexible "remoteness" standard does give them some discretion in determining the probative value of the conviction with similar results.

Federal Rule 609(c) provides that a pardon, annulment, certificate of rehabilitation, or other equivalent procedure renders evidence of the conviction inadmissible. This rule has been changed to conform to the Texas rule that a pardon does not render evidence of a conviction inadmissible.¹¹⁰

On the other hand, Texas courts, in contradistinction to Federal Rules 609(d) and 609(e), have disallowed evidence of both juvenile convictions¹¹¹ and convictions with appeals pending.¹¹² In the latter situation inadmissibility is preferable since an injustice could occur if a conviction were used to impeach and possibly convict a witness in one case followed by a reversal of the conviction on appeal and an acquittal on re-trial.

Rule 610

RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.¹¹³

Rule 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. A question and answer form of interrogation should be favored over a narrative form unless full development of the testimony requires otherwise.

108. See *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 650-51 (Tex. 1970) (citing 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 660 (Supp. 1968)), in which the court held that "the conviction must have been 'sufficiently recent in time to have some bearing on the present credibility of the witness.'" See also *Stephens v. State*, 125 Tex. Crim. 397, 68 S.W.2d 181 (1934), in which the court of criminal appeals decided that "evidence of a conviction is not admissible if the trial court finds it too remote to bear upon the credibility of the witness." The wording of the rule is a combination of these two opinions.

109. *Williams v. State*, 449 S.W.2d 264 (Tex. Crim. App. 1970).

110. *Sipanek v. State*, 100 Tex. Crim. 489, 272 S.W. 141 (1925); *Bernard's, Inc. v. Austin*, 300 S.W. 256 (Tex. Civ. App.—Dallas 1927, writ ref'd).

111. *Warran v. State*, 514 S.W.2d 458 (Tex. Crim. App. 1974); *Rivas v. State*, 501 S.W.2d 918 (Tex. Crim. App. 1973); TEX. FAM. CODE ANN. § 51.13 (Vernon Supp. 1976-77).

112. *Ringer v. State*, 137 Tex. Crim. 242, 129 S.W.2d 654 (1938).

113. Although this rule would undoubtedly be unquestioned by any modern court, it finds express acceptance in only one case in Texas, *Brundige v. State*, 49 Tex. Crim. 596, 95 S.W. 527 (1906). The comments to FED. R. EVID. 610 point out that religious beliefs or affiliation may be shown if relevant to show interest or bias, and such would undoubtedly be the view of a Texas court.

(b) *Scope of cross-examination.* Subject to special rules limiting cross-examination, e.g., in cases of a spouse testifying for a spouse in criminal cases or an accused testifying as to admissibility of a confession, a witness may be cross-examined on any matter relevant to any issue of the case, including credibility.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Comments

While there is no specific statutory or judicial authority approving the specific language of Federal Rule 611(a), the criminal and civil procedural rules in Texas do give the trial court general control over the presentation of witnesses and evidence.¹¹⁴ Thus rule 611(a), adopting the federal rule, accurately reflects Texas law. A requirement has been added to rule 611(a): the question and answer form of interrogation should be employed since this is a strong message of Texas cases.¹¹⁵

Federal Rule 611(b), which limits cross-examination to the subject matter of direct examination, has been changed to provide for the wide open cross-examination generally allowed in Texas courts.¹¹⁶ Recognition has been given to special situations in which cross-examination is limited; primarily this occurs when a spouse is testifying for a spouse in criminal cases,¹¹⁷ or when an accused party is testifying concerning a confession.¹¹⁸ Rule 611(c) which adopts the federal rule unchanged reflects the general rule in Texas disallowing the use of leading questions on direct examination,¹¹⁹ although normally leading questions are considered harmless,¹²⁰ while allowing their use on cross-examination¹²¹ or in questioning an adverse party.¹²²

Rule 612

WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh his memory for the purpose of testifying, either

114. TEX. R. CIV. P. 265; TEX. CODE CRIM. PROC. ANN. art. 38.01 (Vernon 1966); see *Sueter v. State*, 165 Tex. Crim. 578, 310 S.W.2d 81 (1958).

115. *Deams v. State*, 159 Tex. Crim. 496, 265 S.W.2d 96 (1954) (a court can require question and answer form); *Abramson v. Davenport*, 269 S.W.2d 833 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.) (a witness should be examined in question and answer form).

116. *Evansich v. G.C. & S.F.R.R.*, 61 Tex. 24 (1884); *Pride v. Pride*, 318 S.W.2d 715, 719 (Tex. Civ. App.—Dallas 1958, no writ).

117. *Mitchell v. State*, 517 S.W.2d 282 (Tex. Crim. App. 1974).

118. *Lopez v. State*, 384 S.W.2d 345 (Tex. Crim. App. 1964).

119. *St. John v. Moorman*, 272 S.W. 223 (Tex. Civ. App.—El Paso 1925, no writ).

120. *Bell v. State*, 166 Tex. Crim. 340, 313 S.W.2d 606 (1958); *Traders & Gen. Ins. Co. v. Randolph*, 467 S.W.2d 689 (Tex. Civ. App.—Amarillo 1971, no writ).

121. *Jones v. Travelers Ins. Co.*, 374 S.W.2d 779 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.).

122. TEX. R. CIV. P. 182. This rule allows leading questions only of adverse parties and has been so interpreted. *Bell v. Umstadd*, 401 S.W.2d 306 (Tex. Civ. App.—Austin 1966, writ dismissed). In view of the judicially recognized harmless nature of leading questions (see note 120 *supra* and accompanying text) and the broad supervisory powers given to the trial courts over presentation of evidence, however, it is unlikely that allowing leading questions of a truly hostile witness would be considered reversible error. Thus, FED. R. EVID. 611(c) has not been limited to the literal import of rule 182.

(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

Comments

Federal Rule 612, regarding the introduction of writings used to refresh memory is closely reflective of Texas law¹²³ and has not been substantially changed. There is some indication in Texas that if the writing is not actually *used at the trial*, it is not available to opposing counsel,¹²⁴ but this precedent would not prevent a court from acting "in the interests of justice" as provided in the federal rule. The last sentence of Federal Rule 612,¹²⁵ dictating the consequences of a refusal to produce the writing, has been deleted for want of Texas authority either for or against the procedure and because it is a procedural matter inappropriate to a code of evidence. No violence would be done to the Texas law by leaving this provision in the rule, particularly the innocuous phrase allowing the court to "make any order justice requires."

Rule 613

PRIOR STATEMENTS OF WITNESS; IMPEACHMENT AND SUPPORT

(a) *Examining witness concerning prior inconsistent statement.* In examining a witness concerning a prior inconsistent statement made by him, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement, and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party opponent as defined in Rule 803(1).

(b) *Examining witness concerning bias, etc.* In impeaching a witness by proof of circumstances or statements showing bias, interest or the like on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias, interest or the like may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or

123. *Morgan v. State*, 491 S.W.2d 903 (Tex. Crim. App. 1973); *Putnam v. Pannell*, 507 S.W.2d 811 (Tex. Civ. App.—Waco 1974, no writ); *Paul v. Johnson*, 314 S.W.2d 338 (Tex. Civ. App.—Houston 1958, writ dismissed).

124. *Gaskin v. State*, 172 Tex. Crim. 7, 353 S.W.2d 467 (1962); *McGregor v. Gordan*, 442 S.W.2d 751 (Tex. Civ. App.—Austin 1969, writ refused n.r.e.).

125. FED. R. EVID. 612.

statement. If the witness unequivocally admits such bias, interest or the like extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias, interest or the like.

(c) *Prior consistent statements of witnesses.* Prior statements of a witness which are consistent with said witness' testimony shall be allowed only

(1) If said witness is impeached on grounds of bias, interest or the like and such consistent statement was made before the facts and circumstances creating such bias, interest or the like arose, or

(2) If said witness is impeached by a showing or suggestion that said witness was a silent at a time when he would be expected to speak out concerning the subject matter of his testimony and said consistent statement is one that was made at or about the time that such witness would have been expected to speak out concerning the subject matter of his testimony.

Comments

With more valor than clarity, Federal Rule 613 attempts to abolish or at least modify the "foundation" prerequisite to showing inconsistent statements on the part of witnesses. It is arguable that this is a worthwhile, although certainly not a crucial, objective. Texas law, however, definitely requires the familiar laying of a predicate prior to impeachment of witnesses by proof of inconsistent statements or of bias.¹²⁶ Therefore, Federal Rule 613 has been altered to provide a foundation requirement. The last sentence of rule 613(b), making this requirement inapplicable to proof of admissions of a party opponent, conforms to Texas law.¹²⁷ The federal rule applies generally to any "prior statement," and this has been narrowed here to "inconsistent" statements.

The subject matter of rule 613(b) is not covered by the federal rules which leave practitioners to the mercies of outside sources to determine how to impeach witnesses on grounds of bias, interest or the like. Rule 613(b), requiring some foundation and opportunity to explain or deny as a prerequisite to the offering of extrinsic evidence of bias or interest, and affording a right of rebuttal, is in accordance with general Texas rules.¹²⁸ Since one purpose of laying a foundation is to save time in the event the impeaching facts are admitted, Texas recognizes that an unequivocal admission by a witness that a prior inconsistent statement was made, or that a bias exists, eliminates the need and thus the admissibility of extrinsic evidence of the admitted fact.¹²⁹

The rule 613(c) provisions regarding the support of witnesses by proof of consistent statements is another subject not covered by the federal rules. The provisions of rule 613(c) which allow such statements only when made

126. *Huffman v. State*, 479 S.W.2d 62 (Tex. Crim. App. 1972); *Citadel Constr. Co. v. Smith*, 483 S.W.2d 283 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); *Garcia v. Sky Climbers, Inc.*, 470 S.W.2d 261 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); *Carrick v. Hedrich*, 351 S.W.2d 659 (Tex. Civ. App.—Amarillo 1961, no writ).

127. *Contreas v. San Antonio Traction Co.*, 83 S.W. 870 (Tex. Civ. App. 1904, no writ).

128. See 1 C. MCCORMICK & R. RAY, *supra* note 28, §§ 680-681.

129. *Sloan v. State*, 129 Tex. Crim. 131, 84 S.W.2d 484 (1935); *Employers Liab. Assur. Co. v. Groningen & King*, 299 S.W.2d 175 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.).

prior to the circumstances showing bias, interest, or recent fabrication are generally supported by Texas cases.¹³⁰

Rule 614

CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* Subject to rules prohibiting comments on the weight of the evidence, the court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Comments

The interjection of the trial judge into the presentation of evidence must be approached with extreme caution in Texas because of the strict rules prohibiting comments on the weight of the evidence.¹³¹ There is authority, at least in criminal cases, approving the calling of the witness by the trial judge and, therefore, Federal Rule 614(a) has been adopted.¹³² Although the federal rule has not been altered, it is by no means certain that a Texas trial judge has the authority to call a witness "at the suggestion of a party" and then allow that party to cross-examine the witness.

Federal Rule 614(b), concerning the interrogation of witnesses by the court, has been expressly limited by reference to the rule prohibiting judicial comments. There is authority allowing the trial judge to ask clarifying questions¹³³ and questions directed to the admissibility of the witness' testimony.¹³⁴ Without question, a trial judge may freely interrogate witnesses in non-jury cases.¹³⁵ Furthermore, despite the existence of judicial opinion doubting the propriety of Federal Rule 614(c),¹³⁶ it nevertheless has been retained because of the basic unfairness of requiring a party in the presence of the jury to oppose the trial judge's apparently impartial efforts to seek truth and justice.

Rule 615

EXCLUSION OF WITNESSES

Witnesses shall be excluded from the courtroom in accordance with

130. Cases in which consistent statements were admitted after bias was shown: *Lewy & Co. v. Fischel*, 65 Tex. 311 (1886); *Nations v. State*, 91 Tex. Crim. 112, 237 S.W. 570 (1922); *Williams v. State*, 67 Tex. Crim. 287, 148 S.W. 763 (1912). A case in which consistent statements were admitted after recent fabrication: *Barmore v. Safety Cas. Co.*, 363 S.W.2d 355 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.). See also *Skilern & Sons v. Rosen*, 359 S.W.2d 298 (Tex. 1962). Some opinions by the court of criminal appeals seem to allow consistent statements without any prior impeachment. See, e.g., *Lewis v. State*, 504 S.W.2d 900 (Tex. Crim. App. 1974). This liberality, however, has not been incorporated into the rule.

131. *Dallas Joint Stock Land Bank v. Britton*, 134 Tex. 529, 135 S.W.2d 981 (1940); TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1966).

132. *Pugh v. State*, 69 Tex. Crim. 357, 151 S.W. 546 (1912).

133. *Universal Underwriters Lloyds v. Sulik*, 301 S.W.2d 690 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

134. *Milo v. State*, 152 Tex. Crim. 401, 214 S.W.2d 618 (1948).

135. *Marshall v. State*, 164 Tex. Crim. 167, 297 S.W.2d 135 (1956).

136. *State v. Able*, 369 S.W.2d 520 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

Rule 267, Texas Rules of Civil Procedure, and Articles 36.03-36.05 of the Texas Code of Criminal Procedure.¹³⁷

ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Rule 701

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.¹³⁸

Rule 702

TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.¹³⁹

Rule 703

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Comments

This rule, adopting Federal Rule 703 without change, allows an expert to base an opinion or inference on (1) personal knowledge, (2) facts made known at the trial (a) by testimony of other witnesses or (b) by hypothetical questions, and (3) outside sources if of a type reasonably relied upon by experts in the subject area. All of these are recognized by Texas authorities. The use of personal knowledge as a source is the most direct and obvious.¹⁴⁰ The use of facts properly testified to by other witnesses is acceptable¹⁴¹ and the hypothetical question provides the most common source of expert opinion.¹⁴² Texas law also approves the use of outside sources, whether admissible or not, with emphasis on the requirement that they be "of a type

137. TEX. R. CIV. P. 267 and TEX. CODE CRIM. PROC. ANN. arts. 36.03-.05 (Vernon 1966) provide the procedural methods for "invoking the rule" in Texas litigation.

138. FED. R. EVID. 701, adopted here, is generally supported by Texas authority. *See, e.g.*, City of Fort Worth v. Lee, 143 Tex. 551, 186 S.W.2d 954 (1945); Farley v. M & M Cattle Co., 515 S.W.2d 697 (Tex. Civ. App.—Amarillo 1974), *rev'd on other grounds*, 529 S.W.2d 751 (Tex. 1975); Colls v. Price's Creameries, Inc., 244 S.W.2d 900 (Tex. Civ. App.—El Paso 1951, writ ref'd n.r.e.).

139. Here again, FED. R. EVID. 702 is well supported, in fact paraphrased, by Texas authority. *See, e.g.*, Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966); Hopkins v. State, 480 S.W.2d 212 (Tex. Crim. App. 1972); Burns v. Bridge Eng'r Corp., 465 S.W.2d 427 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

140. John F. Buckner & Sons v. Allen, 289 S.W.2d 387 (Tex. Civ. App.—Austin 1956, no writ).

141. Davis v. State, 54 Tex. Crim. 236, 114 S.W. 366 (1908); Bates v. Barclay, 484 S.W.2d 955 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

142. Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965); Atkinson v. State, 511 S.W.2d 293 (Tex. Crim. App. 1974).

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." This includes use of reports of others in the field,¹⁴³ economic data,¹⁴⁴ and learned treatises.¹⁴⁵ A recent case recognizes that a physician, even one employed solely to give testimony, may base his opinion on case history and other relevant statements of the patient.¹⁴⁶

Rule 704

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of the fact.¹⁴⁷

Rule 705

DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Comments

Federal Rule 705, adopted here, probably does not accurately express the mainstream of Texas case law which requires that hypothetical questions include all basic facts.¹⁴⁸ Inferential support for this rule, however, may be found in the cases that express the matter permissively¹⁴⁹—that an expert *may* give basic facts underlying his opinion—thus implying that such facts need not be disclosed. In view of the liberal discovery procedures in Texas it is inconceivable that a well-prepared attorney at the time of trial would not know the adverse expert's opinion and supporting data. Further, in view of the saving clause in rule 705 which guarantees that the data at least will be disclosed on cross-examination, it appears clear that rule 705, in Texas courts as in federal courts, is a streamlining measure that can only benefit litigants on both sides of the case. Therefore, the federal rule has been adopted as a codification of the present trend of Texas case authority.

Comment on Omission of Federal Rule 706

Federal Rule 706, allowing the trial court to appoint expert witnesses,

143. *Sutherland v. McGregor*, 383 S.W.2d 248 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.) (petroleum engineer properly based opinion upon test reports of others); *Gray v. Bird*, 380 S.W.2d 908 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.) (psychiatrist using reports of others, and of psychologists); *Schooler v. State*, 175 S.W.2d 664 (Tex. Civ. App.—El Paso 1943, writ ref'd w.o.m.) (geologist using geological reports of others).

144. *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180 (Tex. 1972); *State Banking Bd. v. Proposed Bayport Bank*, 516 S.W.2d 251 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.); *Williams v. G.M. Corp.*, 501 S.W.2d 930 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

145. *Urquhart v. Barnes*, 335 S.W.2d 666 (Tex. Civ. App.—Fort Worth 1960, no writ).

146. *Slaughter v. Abilene State School*, 21 Tex. Sup. Ct. J. 35 (Oct. 26, 1977).

147. This rule is well supported by Texas authority. *See, e.g., Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965); *Hopkins v. State*, 480 S.W.2d 212 (Tex. Crim. App. 1972).

148. *See, e.g., Mobil Oil Co. v. Dodd*, 528 S.W.2d 297 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

149. *See, e.g., Gulf C. & S.F. Ry. v. Downs*, 70 S.W.2d 318 (Tex. Civ. App.—Dallas 1934, writ ref'd).

enjoys little support in Texas case history. Except for the general authority, codified herein as rule 614, allowing the court to call witnesses, there is no Texas authority specifically permitting the trial judge to call an expert witness. On the other hand, there is no specific prohibition of such a practice, except for the sanctions against commenting on the weight of the evidence, which are arguably violated by allowing the trial judge to call an expert while allowing the jury to know that he has done so. If the procedure allowed by Federal Rule 706 were adopted, it would have the effect of giving prominence to the opinion of the court appointed expert in apparent contradiction to the prohibition of judicial comment on the evidence.¹⁵⁰

Noted scholars are in favor of the practice sanctioned by Federal Rule 706,¹⁵¹ and the Federal Advisory Committee touts the rule as a reform to eliminate "shopping for experts" and "the venality of some experts." The notion, however, of allowing a court's "pet expert" virtually to decide every contested law suit is not an unqualified "reform." It is doubtful that a court-appointed expert, *known by the jury to be such*, could testify under Texas law, and, since keeping the jury in the dark would present more problems than the practice would eliminate, the federal rule has been eliminated from this codification.

ARTICLE VIII—HEARSAY

Rule 801

DEFINITIONS

The following definitions apply under this article:

(a) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant*. A "Declarant" is a person who makes a statement.

(c) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Comments

Defining "statement" to include nonverbal conduct only if intended as an assertion is admittedly contrary to the line of judicial thought which regards implications from conduct as hearsay if a direct statement to the same effect would be hearsay.¹⁵² Nevertheless, the definition in the federal rule, embodying the notion that non-assertive conduct is non-hearsay, is both sensible and thoroughly consistent with the policies justifying the hearsay rule. Thus its adoption here. It is believed that a Texas court, if now directly confronted with the issue, would so hold.¹⁵³

150. See Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961).

151. See, e.g., 9 J. WIGMORE, EVIDENCE § 2484 (1940).

152. Wright v. Doe D. Tatham, 7 Ad. & El. 313, 112 Eng. Rep. 488 (Ex. 1837). The few Texas cases in which the problem is raised seem to follow the view taken in the Wright case. See, e.g., Powell v. State, 88 Tex. Crim. 349, 227 S.W. 188 (1921); Allen v. Reliable Life Ins. Co., 394 S.W.2d 835 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.). But see St. Louis S.W. Ry. v. Arkansas & Tex. Grain Co., 95 S.W. 656 (Tex. Civ. App. 1906, writ dismissed) (admitting evidence of buyers' failure to complain of quality of corn). See also the discussion in 1 C. McCORMICK & R. RAY, *supra* note 28, § 784, in which the use of the word "seem" in the comment is explained.

153. See McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930). The federal rules' definition of hearsay embodied in rule 801(c) is the same as that given by Texas courts.

Federal Rule 801(d) is omitted in its entirety. It establishes as non-hearsay (1) certain prior statements of witnesses and (2) admissions of a party opponent. In Texas prior statements are admitted only for purposes of impeachment and support under the rules set forth in article VI above and are admitted as primary evidence only if they fall within some recognized exception to the hearsay rule.¹⁵⁴

Federal Rule 801(d)(1)(C) describes as non-hearsay a prior statement of a witness if it is "one of identification of a person made after perceiving him." This type of statement is admissible in Texas but as an exception to the hearsay rule rather than as non-hearsay.¹⁵⁵ Therefore, the rule governing the admissibility of these types of statements appears as a subsection to 803, below. Similarly, Texas regards an admission of a party opponent as an exception to the hearsay rule,¹⁵⁶ and consequently such admissions are also covered under rule 803, below.

Rule 802

HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by act of the Legislature.¹⁵⁷

Rule 803

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Comment

Texas is one of the few state jurisdictions that recognizes this exception.¹⁵⁸ It is uncertain whether Texas courts would authorize the final phrase "or immediately thereafter."

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Comment

Texas has recognized this exception when the declaration is spontaneous,

See, e.g., Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 337 (Tex. 1963); Salas v. State, 403 S.W.2d 440, 441 (Tex. Crim. App. 1966).

154. *See* 1 C. McCORMICK & R. RAY, *supra* note 28, § 785, and cases cited therein.

155. *See* Turner v. State, 486 S.W.2d 797 (Tex. Crim. App. 1972), and cases cited therein. *See also* Thames v. State, 453 S.W.2d 495 (Tex. Crim. App. 1970), *rev'd on other grounds*, 408 U.S. 937 (1972). Actually the decision to regard previous identification as an exception to the hearsay rule is only inferentially supported by these cases which admit such evidence upon the sole ground that it is "not improper." Turner v. State, *supra*, at 800.

156. Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331 (Tex. 1963).

157. This is FED. R. EVID. 802 changed only to conform to the political facts of Texas. There is, quite obviously, no problem concerning the general exclusion of hearsay. In Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 337 (Tex. 1963) (quoting 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 781 [2d ed. 1956]), the court stated that "the well-accepted rule is [that] 'evidence of a statement made out of court when such evidence is offered for the purpose of proving the truth of such previous statement is inadmissible as hearsay.'"

158. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); Anderson v. State, 454 S.W.2d 740 (Tex. Crim. App. 1970).

and is made without opportunity for reflection.¹⁵⁹ In Texas the "startling event or condition" must be established by evidence independent of the declaration.¹⁶⁰

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Comments

This exception includes several concepts. The first, relating to a statement of the declarant's then existing state of mind, emotion, or mental feeling substantially reflects Texas law.¹⁶¹ Texas also recognizes the *Hillmon*-type expression of a declarant's intent, plan, or design offered to prove that the declarant carried out such intent, plan, or design.¹⁶² Additionally, statements of a declarant's then existing physical condition or bodily health are allowed in Texas whether made to a physician or to a layman.¹⁶³

Texas has never expressly drawn Justice Cardoza's "high-water line" to exclude "a statement of memory or belief to prove the fact remembered or believed,"¹⁶⁴ but undoubtedly would do so if the issue arose. Statements of memory or belief concerning a declarant's will are allowed in Texas provided they relate to the issue of whether the will was made or revoked or to the issue of the testator's intent.¹⁶⁵ Declarations of a testator concerning the part played by third parties in influencing the making or contents of the will are not admissible,¹⁶⁶ and the last clause of the above exception must be interpreted to that effect.

Comment on Omission of Federal Rule 803(4)

Federal Rule 803(4) expresses the standard American view that statements made to a treating physician concerning past or present symptoms and concerning the history and causes of an injury, if relevant to diagnosis and treatment, are admissible as exceptions to the hearsay rule.¹⁶⁷ Surprisingly, Texas does not recognize this exception. These statements are ad-

159. *Evans v. State*, 480 S.W.2d 387 (Tex. Crim. App. 1972); *Furrh v. State*, 168 Tex. Crim. 299, 325 S.W.2d 699 (1959); *Jones v. Hopper*, 506 S.W.2d 768 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

160. *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172 (Tex. 1963).

161. *Allen v. Riedel*, 425 S.W.2d 665 (Tex. Civ. App.—Eastland 1968, no writ); *Houston Chronicle Publishing Co. v. McDavid*, 157 S.W. 224 (Tex. Civ. App.—Austin 1913, no writ).

162. *Davis v. Argonaut Sw. Ins. Co.*, 464 S.W.2d 102 (Tex. 1971); *Liberty Mut. Ins. Co. v. Nelson*, 142 Tex. 370, 178 S.W.2d 514 (1944); *Lowe v. State*, 163 Tex. Crim. 578, 294 S.W.2d 394 (1956); *Chance v. State*, 125 Tex. Crim. 318, 68 S.W.2d 212 (1933).

163. *Casualty Ins. Co. v. Salinas*, 160 Tex. 415, 333 S.W.2d 109 (1960); *Miller Mut. Fire Ins. Co. v. Ochoa*, 432 S.W.2d 118 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.).

164. *Shepard v. United States*, 290 U.S. 96, 105 (1933).

165. *Compton v. Dannenbauer*, 120 Tex. 14, 35 S.W.2d 682 (1931); *Miller v. Miller*, 285 S.W.2d 373 (Tex. Civ. App.—Eastland 1955, no writ).

166. *Self v. Thornton*, 343 S.W.2d 485 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.); *Edwards v. Williams*, 292 S.W.2d 783 (Tex. Civ. App.—Eastland 1956, no writ).

167. *FED. R. EVID.* 803(4); *see C. McCORMICK, supra* note 61, § 92.

missible *to support* a physician's diagnosis and opinion but not as substantive evidence and, thus, not as exceptions to the hearsay rule.¹⁶⁸ Accordingly, this exception, although meritorious, has been omitted from this codification.

(4) *Admission by a party-opponent.* A statement offered against a party which is (A) his own statement, in either his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by his agent employee or other person authorized by him to make a statement concerning the subject, or (D) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, or (E) in civil cases, a statement by a person in privity of interest or obligation with a party to the extent that the rights, obligations or remedies of the party are affected by the acts of the declarant.

Comments

In terms of use and importance this exception should logically come first under rule 803. It is inserted here, however, as a substitute for Federal Rule 803(4) so as to adhere as closely as possible to the chronology of Federal Rule 803.

(A) Texas courts recognize admissions by a party opponent as an exception to the hearsay rule and do not require that the declarant be unavailable or that the statement be against interest at the time it was made.¹⁶⁹ Such admissions do not have the effect of judicial admissions; they are evidentiary only and subject to contradiction and explanation.¹⁷⁰

(B) Adoptive admissions¹⁷¹ and tacit admissions¹⁷² are also recognized by Texas courts.

(C) Texas cases further allow representative admissions by persons authorized to speak on the subject (which is a rare situation).¹⁷³ The federal rules allow such representative statements "concerning a matter within the scope of his agency or employment, made during the existence of the relationship,"¹⁷⁴ but Texas courts have not gone this far.¹⁷⁵

(D) Statements made by co-conspirators during the course and in furtherance of the conspiracy are admitted in Texas as under the federal rules.¹⁷⁶

(E) The common law practice of admitting statements of persons in privity of interest with parties is apparently rejected by the federal rules.

168. See *Onker v. Great A. & P. Tea Co.*, 131 Tex. 57, 112 S.W.2d 170 (1938); *Advance Loan Serv. v. Mandik*, 306 S.W.2d 754 (Tex. Civ. App.—Dallas 1957, no writ); *Ray, Restrictions of Doctors' Testimony in Personal Injury Cases*, 14 Sw. L.J. 133 (1960).

169. *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963).

170. *Stafford v. Wilkinson*, 157 Tex. 483, 304 S.W.2d 364 (1957).

171. *Thornell v. Missouri State Life Ins. Co.*, 249 S.W.203 (Tex. Comm'n App. 1923, jdgmt adopted); *Insurance Co. of N. America v. Stroborg*, 456 S.W.2d 402 (Tex. Civ. App.—Austin 1970), *rev'd*, 464 S.W.2d 827 (Tex. 1971). In reversing *Stroborg* the supreme court did not object to the admissibility of the death certificate. It said that such was "subject to explanation and rebuttal." 464 S.W.2d at 829.

172. *Counts v. State*, 149 Tex. Crim. 348, 194 S.W.2d 267 (1946).

173. See, e.g., *Big Mack Trucking Co. v. Dickerson*, 497 S.W.2d 283 (Tex. 1973).

174. FED. R. EVID. 801(d)(1)(d).

175. See, e.g., *Big Mack Trucking Co. v. Dickerson*, 497 S.W.2d 283 (Tex. 1973).

176. *Womble v. State*, 165 Tex. Crim. 23, 301 S.W.2d 928 (1957); *Aguero v. State*, 164 Tex. Crim. 265, 298 S.W.2d 822 (1957); *Harang v. Aetna Life Ins. Co.*, 400 S.W.2d 810 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

Though the position reflected by the federal rule appears the better reasoned,¹⁷⁷ Texas courts have chosen to admit "vicarious admissions,"¹⁷⁸ thus mandating the inclusion of rule 803(4)(E).

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

Comments

Texas cases announcing this exception are substantially in accord with the federal rules,¹⁷⁹ although most use the phrase "at or near the time"¹⁸⁰ rather than the phrase, "when the matter was fresh in his memory" as provided by Federal Rule 803(5). The federal version also contains a final sentence providing that although such memorandum or record may be read into evidence by the proponent, it does not become an exhibit unless offered by the adverse party. This sentence has been omitted here as it appears to contradict Texas case law, which regards the memorandum as evidence when used.¹⁸¹

(6) *Records of regularly conducted activity.* Business and hospital records shall be admitted into evidence as an exception to the hearsay rule in accordance with the provisions of Article 3737(e), Vernon's Texas Statutes Annotated.

Comments

Article 3737(e) of the Civil Statutes is the Texas counterpart of Federal Rules 803(6) and (7) and is applicable in criminal as well as civil cases.¹⁸² It should be noted that Texas courts have used the statutory requirement of "personal knowledge" to limit the exception to primary hearsay rather than admitting hearsay on hearsay.¹⁸³ Also, without apparent statutory authority, Texas courts have imposed certain limitations on the admissibility of medical diagnoses that appear in hospital records.¹⁸⁴

(7) *Public records and reports.* Public records and reports shall be admitted into evidence as an exception to the hearsay rule in accordance with the provisions of Article 3731(a), Vernon's Texas Statutes Annotated, and related statutes.

177. See Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929).

178. Dixon v. Huggins, 495 S.W.2d 621 (Tex. Civ. App.—Waco 1973, writ dismissed) (title to real property); Carter v. Carter, 391 S.W.2d 546 (Tex. Civ. App.—Dallas 1965, no writ) (statement by deceased as to ownership of cash account used against administrator of estate); Henderson v. Frio County, 362 S.W.2d 406 (Tex. Civ. App.—San Antonio 1962, no writ) (dedication of road by predecessor in title); Ballard v. Ballard, 296 S.W.2d 811 (Tex. Civ. App.—Galveston 1956, no writ) (statement of insured used against main beneficiary of life insurance policy). Most of these cases are explainable as declarations against interest. See 2 C. McCORMICK & R. RAY, *supra* note 28, §§ 1165-1179.

179. Sorell v. State, 74 Tex. Crim. 100, 167 S.W. 356 (1914); Fire Ass'n v. Nami, 77 S.W.2d 260 (Tex. Civ. App.—San Antonio 1934, no writ).

180. Wood v. State, 511 S.W.2d 37, 44 (Tex. Crim. App. 1974); General Accident v. Camp, 348 S.W.2d 782, 785 (Tex. Civ. App.—Houston 1961, no writ).

181. Wood v. State, 511 S.W.2d 37 (Tex. Crim. App. 1974); Fort Worth & D.C. Ry. v. Garlington, 92 S.W. 270 (Tex. Civ. App. 1906, no writ).

182. See, e.g., Morgan v. State, 503 S.W.2d 770 (Tex. Crim. App. 1974).

183. See, e.g., Skillern & Sons v. Rosen, 359 S.W.2d 298 (Tex. 1962).

184. See, e.g., Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966).

Comments

Article 3731(a) of the Civil Statutes is the Texas counterpart of Federal Rules 803(8)-(10). There are other related statutes exempting various public records from the hearsay rule,¹⁸⁵ but article 3731(a) seems to incorporate all of them and to provide fully the exception needed in this area. Again the courts have imposed additional standards such as a requirement that opinions be by qualified persons¹⁸⁶ and have consistently closed the second hearsay door.¹⁸⁷

(8) *Prior statements of identification.* A statement of identification of a person made after perceiving that person and made by a declarant who testifies at the trial or hearing and is subject to cross-examination concerning such statement.¹⁸⁸

(9) *Records of religious organizations.* Statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Comments

There is no specific Texas authority supporting or rejecting this exception found in Federal Rule 803(11). Most religious organizations would qualify as a "business" under section (4) of article 3737(e) of the Civil Statutes but many of the records referred to might fall short of the basic requirements of section (1) of that statute. Despite the lack of authority, the exception is so innocuous and so free from possible injustice that it has been retained.

(10) *Marriage, baptismal and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Comments

Again there is no specific Texas authority confirming or denying this exception found in Federal Rule 803(12). Most marriage certificates are on record in a county clerk's office and hence are admissible under article 3731(a). As with rule 803(9) above, this exception appears innocuous and uncontroversial and is retained here for the sake of symmetry.

(11) *Records concerning family history or relating to interest in property.* Statements of fact concerning personal or family history or pedigree, or statements purporting to establish or reflect an interest in property contained in any document or in a properly recorded duplicate thereof, provided that the document conforms to and is recorded for the time and in the manner prescribed by section 52 of the Texas Probate

185. See generally TEX. REV. CIV. STAT. ANN. arts. 3718-3737(c) (Vernon 1926 & Supp. 1976-77).

186. Combined Am. Ins. Co. v. McCall, 497 S.W.2d 350 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

187. See, e.g., Smith v. Riviere, 248 S.W.2d 526 (Tex. Civ. App.—Texarkana 1951, no writ).

188. See note 155 *supra*. This exception embodies the same concept as FED. R. EVID. 801(1)(c) which presents it as non-hearsay.

Code, Article 3726, Vernon's Texas Statutes Annotated, and/or Article 3726(a), Vernon's Texas Statutes Annotated.

Comments

This rule is a codification of the subject matter covered by Federal Rules 803(13)-(15). Federal Rule 803(13), providing an exception for matters of family history or pedigree contained in "family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, tombstones, or the like," would not be acceptable in Texas as several cases have imposed a requirement that the declarant be unavailable for such evidence.¹⁸⁹ An exception reflecting Federal Rule 803(13) is encompassed in rule 804. Documents containing such statements of family or personal history as well as documents containing statements affecting an interest in property, being the subject matter of Federal Rules 803(14) and (15), are admissible in Texas.

(12) *Statements in ancient documents.* Statements in a document in existence thirty years or more the authenticity of which is established.

Comments

Texas recognizes the ancient documents exception embodied in Federal Rule 803(16) but extends the time to thirty years.¹⁹⁰ This exception usually applies where there is a problem of authenticity but also has been employed to admit, for the truth of their contents, recitals in a letter,¹⁹¹ recitals in a deed,¹⁹² and even recitals in a sixty-nine-year old amended petition.¹⁹³ This latter situation strains the policy of the exception as no reliability emanates from allegations in pleadings regardless of their age.

(13) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or persons in particular occupations.¹⁹⁴

Comment on Omission of Federal Rule 803(18)

Federal Rule 803(18) provides an exception for learned treatises called to the attention of an expert during testimony. Texas does not recognize such an exception and allows learned treatises to be used only to test the expert's opinion and not as primary evidence.¹⁹⁵ Even then, the expert must agree that the treatise is authoritative before it can be used.¹⁹⁶

189. *Summerhill v. Darrow*, 94 Tex. 71, 57 S.W. 942 (1900); *Carter v. Barnes*, 25 S.W.2d 606 (Tex. Comm'n App. 1930, holding approved); *Wolf v. Wilhelm*, 146 S.W. 216 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

190. *Rio Bravo Oil Co. v. Staley Oil Co.*, 138 Tex. 198, 158 S.W.2d 293 (1942); *Emory v. Bailey*, 11 Tex. 337, 234 S.W. 660 (1921).

191. *Smith v. Lynn*, 152 S.W.2d 838 (Tex. Civ. App.—San Antonio 1941, no writ).

192. *Corder v. Foster*, 505 S.W.2d 645 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

193. *Moore v. Horn*, 359 S.W.2d 947 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

194. This exception is well recognized in Texas. See, e.g., *American Bankers Ins. Co. v. Fish*, 412 S.W.2d 723 (Tex. Civ. App.—Amarillo 1967, no writ) (official directory of AMA admitted to prove hospital approval); *McMillen Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (charts showing food value of turkey feed admitted).

195. *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949); *Simms v. Southwest Tex. Methodist Hosp.*, 535 S.W.2d 192 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

196. *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949); *Seeley v. Eaton*, 506 S.W.2d

(14) *Reputation concerning personal or family history.* Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

Comments

The exception recognized by Federal Rule 803(19) has allowed proof in Texas of a person's death and manner of death,¹⁹⁷ of the date of arrival in Texas,¹⁹⁸ of marriage,¹⁹⁹ age,²⁰⁰ and matters of pedigree.²⁰¹ There is some indication that matters of pedigree can be proved only by family reputation;²⁰² this proviso, however, is so artificial, so illogical, and so complicating, and matters of pedigree are so susceptible of direct proof in most cases, that it is ignored in the above rule.

(15) *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

Comments

Texas admits evidence of reputation as to boundaries which arises before the controversy as prescribed by Federal Rule 803(20).²⁰³ There is no Texas case admitting or excluding reputation as to matters of history but the phrase is retained to bridge the narrow gap between well-publicized events which require direct proof and historical events subject to judicial notice.

(16) *Reputation as to character.* Reputation of a person's character among his associates or in the community.

Comments

The Texas law on this subject has been codified in rules 405 and 608. As shown in the comments to those rules, the Texas law with reference to reputation as to character is limited to reputation in the community.²⁰⁴ The federal rule allowing expansion of this principle to include the person's associates is more redundant than substantial and, thus, has been retained.

719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (requirement, though followed, characterized as "harsh").

197. Byers v. Wallace, 87 Tex. 503, 28 S.W. 1056 (1894).

198. Keck v. Woodward, 116 S.W. 75 (Tex. Civ. App. 1909, writ ref'd).

199. Schwingle v. Keifer, 135 S.W. 194 (Tex. Civ. App. 1911), *aff'd*, 105 Tex. 609, 153 S.W. 1132 (1912).

200. Jaffe v. Deckard, 261 S.W. 390 (Tex. Civ. App.—Amarillo 1924, writ ref'd).

201. Byers v. Wallace, 87 Tex. 503, 28 S.W. 1066 (1894); Gibson v. Dickson, 178 S.W. 44 (Tex. Civ. App.—Dallas 1915, writ ref'd).

202. Byers v. Wallace, 87 Tex. 503, 28 S.W. 1066 (1894); Gibson v. Dickson, 178 S.W. 44 (Tex. Civ. App.—Dallas 1915, writ ref'd); Schwingle v. Keifer, 135 S.W. 194 (Tex. Civ. App. 1911), *aff'd*, 105 Tex. 609, 153 S.W. 1132 (1913).

203. Clark v. Hiles, 67 Tex. 141, 2 S.W. 356 (1886); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

204. Smith v. State, 414 S.W.2d 659 (Tex. Crim. App. 1967). *See also* the cases cited above under rules 405 and 608.

Comment on Omission of Federal Rules 803(22) and (23)

Federal Rule 803(22) allows evidence of a judgment of final conviction to be admitted in a subsequent trial "to prove any fact essential to sustain the judgment." This is unacceptable in Texas²⁰⁵ and is not a lamentable omission. In most cases a jury unjustifiably will tend to give conclusive weight to the action of a former jury, causing the judge to reject the evidence under the authority now codified as rule 403.²⁰⁶

Federal Rule 803(23) would admit judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. Worthy as this exception may be, in Texas such judgments will stand or fall in accordance with their compliance with articles 3726(a) and 3731(a).²⁰⁷ The admissibility of judgments in these instances is, therefore, dealt with in rules 803(7) and 803(11).

(17) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant, if obtainable.

Comments

The catch-all provision of Federal Rule 803(24) embodied here has no specific Texas support, but the Texas courts have never placed a lid on exceptions to the hearsay rule and are free to consider any reasonably reliable evidence whether or not categorized under established rules. In fact, all of the exceptions from 803(8) to 803(16) could be omitted and left to the reasonable discretion of the trial judge under this catch-all exception, if and when such evidence is presented. The phrase "if obtainable" has been added to the requirement in the federal rule that the name and address of the declarant be given to the opponent in advance of trial.²⁰⁸

205. *Arnold v. State*, 148 Tex. Crim. 310, 186 S.W.2d 995 (1945); *Smith v. White*, 216 S.W.2d 672 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.); *Stewart v. Profit*, 146 S.W. 563 (Tex. Civ. App.—Galveston 1912, writ ref'd n.r.e.).

206. Possibly the exception would be justifiable in a civil action brought by a criminal defendant for purposes of profiting from his own crime. *See, e.g.*, *Connecticut Fire Ins. Co. v. Ferrara*, 277 F.2d 388 (8th Cir. 1960).

207. *See Wood v. Paulus*, 524 S.W.2d 749 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

208. This is probably unnecessary in all but the strictest courts. However, in the case which begat this rule, *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), the declarant's name and address are unknown.

Rule 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Comments

A leading Texas case states that unavailability "means in Texas that the witness is dead, or that he had become insane, or is physically unable to testify, or is beyond the jurisdiction of the court, or 'that his whereabouts is unknown and that diligent search has been made to ascertain where he is, or that he has been kept away from the trial by the adverse party.'"²⁰⁹ There is also authority recognizing that a proper invocation of a privilege establishes unavailability.²¹⁰ Although there is no support for the obstinacy described in section (2), or for the lack of memory described in section (3), these should be retained as they represent legitimate conditions of unavailability if genuine. If spurious, the trial court retains the discretion under the last paragraph of the rule to exclude the hearsay evidence pursuant to a finding of availability.

The Texas courts are very strict about the requirements of section (5), holding that there must be a showing not only that the witness is absent and away from the jurisdiction of the court, but also that his deposition could not have been taken in advance of trial.²¹¹

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal proceeding, the use of testimony taken by way of deposition is controlled by the provisions of Article 39.12, Texas Code of Criminal Procedure.

209. Hall v. White, 525 S.W.2d 860, 862 (Tex. 1975). The conditions described in this quotation all fit under rule 804(a)(5).

210. Liberty Mut. Ins. Co. v. Heard & Jones Drug Stores, Inc., 446 S.W.2d 911 (Tex. Civ. App.—Amarillo 1969, no writ).

211. See Hall v. White, 525 S.W.2d 860, 862 (Tex. 1975). See also TEX. CODE CRIM. PROC. ANN. art. 39.12 (Vernon 1966).

Comments

The Texas rule in this area of hearsay exceptions is substantially the same as the federal rule.²¹² The major difference concerns the use of depositions taken in the same case, which are freely available in Texas civil cases.²¹³ In criminal cases a showing of unavailability is required for use of depositions;²¹⁴ hence, the additional sentence. Texas courts have not required an identity of issues²¹⁵ or identity of parties,²¹⁶ thus the language of the federal rules relaxing such requirement is appropriate.

(2) *Dying declarations.* The dying declaration of a deceased person may be offered in evidence, either for or against a defendant charged with the homicide of such deceased person, under the restrictions hereafter provided. To render the declarations of the deceased competent evidence, it must be satisfactorily proved:

1. That at the time of making such declaration he was conscious of approaching death, and believed there was no hope of recovery;
2. That such declaration was voluntarily made, and not through the persuasion of any person;
3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement; and
4. That he was of sane mind at the time of making the declaration.

Comments

Rule 804(b)(2) incorporates article 38.20 of the Texas Code of Criminal Procedure. It is more restrictive than Federal Rule 804(b)(2) in that it limits the use of dying declarations to cases in which the defendant is charged with the homicide of the declarant and requires that the declarant be deceased.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, including statements detrimental to the declarant's civil cause of action or defense in pending or proposed litigation, that a reasonable man in his position would have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless the State is relying solely upon circumstantial evidence, the guilt of the declarant is inconsistent with the guilt of the accused and the facts show that the declarant was so situated that he might have committed the crime.

Comments

Federal Rule 804(b)(3) has been altered here to reflect the Texas law accurately with respect to statements against penal interest tending to exculpate the accused. Such statements are allowed in criminal cases, but only

212. *Lone Star Gas Co. v. State*, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941); *Cumpston v. State*, 155 Tex. Crim. 385, 235 S.W.2d 446 (1950).

213. TEX. R. CIV. P. 213.

214. *Cumpston v. State*, 155 Tex. Crim. 385, 235 S.W.2d 446 (1950); TEX. CODE CRIM. PROC. ANN. art. 39.12 (Vernon 1966).

215. See, e.g., *Bryant v. Trinity Universal Ins. Co.*, 411 S.W.2d 945 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

216. *Maryland Cas. Co. v. Lee*, 165 S.W.2d 135 (Tex. Civ. App.—Galveston 1942, writ ref'd); *Security Realty & Dev. Co. v. Bunch*, 143 S.W.2d 687 (Tex. Civ. App.—Beaumont 1940, writ dismiss'd jdgmt cor.).

under circumstances set forth in the rule.²¹⁷ It is not clear whether statements against penal interest are allowed in civil cases, but since most such statements also involve civil liability the issue is moot. Assuming the declarant is unavailable,²¹⁸ the federal rule and this codification of the Texas rule are substantially similar in all other respects.²¹⁹

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Comments

Since article 3731(a) provides for the admissibility of the ever-increasing accumulation of vital statistics and other records, the need to establish pedigree and family history through the hearsay exception found in rule 804(b)(4) will probably diminish with time. With minor differences, Texas cases have followed the provisions of Federal Rule 804(b)(4). Statements concerning the declarant's own history have been admitted²²⁰ as well as statements concerning another person,²²¹ even when the declarant was not part of the family.²²² Additionally, Texas courts have required the statement to be made prior to the beginning of the controversy.²²³ This exception appears to be broad enough to encompass declarations "contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, tombstones, or the like," as described in Federal Rule 803(13), and authorizes the admission of such declarations in Texas upon a showing that the declarant is unavailable.²²⁴

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence when the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests

217. See *Cameron v. State*, 153 Tex. Crim. 29, 217 S.W.2d 23 (1949), and cases cited therein. See also *Woodard v. State*, 463 S.W.2d 197 (Tex. Crim. App. 1971).

218. *Big Mack Trucking Co. v. Dickerson*, 497 S.W.2d 283 (Tex. 1973).

219. See *Duncan v. Smith*, 393 S.W.2d 798 (Tex. 1965) (interests to be determined "at time of making").

220. *Lowder v. Schluter*, 78 Tex. 103, 14 S.W. 205 (1890); *Simpson v. Simpson*, 380 S.W.2d 855 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).

221. *Bowden v. Caldron*, 554 S.W.2d 25 (Tex. Civ. App.—Texarkana 1977, writ pending); *Smith v. Lynn*, 152 S.W.2d 838 (Tex. Civ. App.—San Antonio 1941, no writ).

222. *Howard v. Russell*, 75 Tex. 171, 12 S.W. 525 (1889) (recitals in Masonic Lodge records); *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (employee's declaration).

223. See, e.g., *Nehring v. McMurrian*, 94 Tex. 45, 57 S.W. 943 (1900).

224. See cases cited note 189 *supra*. See also *Sherrill v. Estate of Plumley*, 514 S.W.2d 286 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.), which casts some doubt upon this rule when the declarant's identity is unknown. Such matters are, however, always subject to ad hoc variation, and, as previously suggested, are better left to trial court discretion under catch-all provisions than to inflexible and complicating rules.

of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant, if obtainable.²²⁵

Rule 805

HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.²²⁶

Rule 806

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Comments

Except for the last sentence, this rule enjoys general support in Texas.²²⁷ The last sentence is probably contrary to rule 186 of the Texas Rules of Civil Procedure. It is adopted here, however, and should be interpreted as leaving the decision regarding cross-examination to the discretion of the trial judge depending on the identity of the declarant and the nature of the hearsay statement.

ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

Rule 901

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) Whenever the relevance of a particular item of evidence depends upon its relationship to, or identification with, a person or object, such relationship or identification must be shown by satisfactory evidence, and, unless the circumstances show a genuine dispute or raise suspicions concerning such relationship or identification, the admissibility of such item of evidence shall be favored.

225. This catch-all provision is proper and useful for the same reasons as are set forth in the comment to rule 803(17). When the declarant is unavailable the need for this provision increases. It should be clearly understood that when the declarant is unavailable the requirement to produce the declarant's name and address will not be inflexible.

226. Rule 805 has long enjoyed support in Texas. *See, e.g.*, *Skillern & Sons v. Rosen*, 359 S.W.2d 298 (Tex. 1962).

227. *Mitchell v. State*, 87 Tex. Crim. 530, 222 S.W. 983 (1920); *Hamblin v. State*, 34 Tex. Crim. 368, 30 S.W. 1075 (1895).

Comments

Federal Rule 901(a) has little or no meaning. Presumably, it represents an effort to reduce authentication requirements to a minimum. Rule 901(a), as drafted here, better presents the matter in light of the fact that Texas expressly requires authentication. An item of evidence must be connected to the person or object from which it purports to emanate.²²⁸ Texas courts, however, are relatively relaxed about the quality and quantity of proof needed, particularly in the absence of a genuine dispute.²²⁹

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirement of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.²³⁰

(2) *Non-expert opinion on handwriting.* Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.²³¹

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.²³²

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Comments

The meaning of this last provision is not clear. The Advisory Committee comments to Federal Rule 901(b)(4) indicate that it is intended to encompass authentication by circumstantial evidence. The examples given are cases where a telephone conversant is identified by reference to that person's peculiar and individual knowledge and where letters are authenticated by their contents which express facts known only by the alleged author. If this be the intent of this provision, Texas accepts such circumstantial authentication.²³³ The federal rule also permits authentication by "distinctive characteristics" such as fingerprints. This also is accepted in Texas.²³⁴

228. *Texas & N.O.R.R. v. Lemke*, 365 S.W.2d 148 (Tex. 1963) (railway speed tape must be connected to point on ground to be relevant); *Hicks v. State*, 545 S.W.2d 805 (Tex. Crim. App. 1977); *Luna v. State*, 493 S.W.2d 854 (Tex. Crim. App. 1973); *Goetz v. Goetz*, 534 S.W.2d 716 (Tex. Civ. App.—Dallas 1976, no writ).

229. *See, e.g.*, *Robertson v. Du Bose*, 76 Tex. 1, 13 S.W. 300 (1890); *Binyon v. State*, 545 S.W.2d 448 (Tex. Crim. App. 1976); *TEX. R. CIV. P.* 93(h), (i).

230. This provision could be eliminated without significant loss. It remains, however, because it is consistent with Texas case law permitting simple testimony that a matter is what it is claimed to be. For a good illustration see *Hanover Fire Ins. Co. v. Slaughter*, 111 S.W.2d 362 (Tex. Civ. App.—Amarillo 1937, no writ). In that case the Texas Standard Fire Insurance provisions were authenticated by an experienced agent's testimony rather than by a certified copy of the provisions on file with the Insurance Commission. *See also Binyon v. State*, 545 S.W.2d 448 (Tex. Crim. App. 1976); *Luna v. State*, 493 S.W.2d 854 (Tex. Crim. App. 1973).

231. This provision is perfectly consistent with longstanding Texas authority. *See Garner v. State*, 100 Tex. Crim. 626, 272 S.W. 167 (1925). *See also Janak v. Security Lumber Co.*, 513 S.W.2d 300 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

232. Rule 901(b)(3) is supported by *TEX. REV. CIV. STAT. ANN.* art. 3737(b) (Vernon Supp. 1976-77) and by *TEX. CODE CRIM. PROC. ANN.* art. 38.27 (Vernon 1966).

233. *Gleason v. Davis*, 155 Tex. 467, 289 S.W.2d 228 (1956).

234. *See, e.g.*, *Xanthull v. State*, 403 S.W.2d 807 (Tex. Crim. App. 1966) (palmprints); *Matula v. State*, 390 S.W.2d 263 (Tex. Crim. App. 1965) (fingerprints); *Martinez v. State*, 169 Tex. Crim. 229, 333 S.W.2d 370 (1960) (shoe marks).

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through a mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.²³⁵

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if circumstances, including self-identification, show the person answering to be the one called or to be a representative of the business called.

Comments

The federal rule is simplified by this version without any loss of import. The Texas cases involving identification of telephone conversants do not recognize the distinction made by the federal rule between business and personal calls. They have allowed identification by dialing the person or business at the assigned number, by self-identification, or by other circumstances that indicate the recipient of the call is the person or business intended.²³⁶

(7) *Public records or reports.* Authentication of public records and reports as provided in Article 3731(a), Vernon's Texas Statutes Annotated.²³⁷

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence thirty years or more at the time it is offered.²³⁸

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Comments

The Advisory Committee comment to Federal Rule 901(b)(9) states that this provision is intended to authenticate X-ray photographs and computer print-outs or evidence of similar nature. Texas statutes and court decisions recognize the admissibility of such exhibits if certain standards are established that tend to show that "the process or system produces an accurate result."²³⁹

235. Rule 901(b)(5) allows identification of a voice in a manner comparable to authentication of handwriting under §§ (2) and (3) and likewise enjoys support in Texas. *See, e.g.*, Gleason v. Davis, 155 Tex. 467, 289 S.W.2d 228 (1956); Edwards v. State, 551 S.W.2d 731 (Tex. Crim. App. 1977) (voice recording identified by witness who was present at original conversation); France v. State, 148 Tex. Crim. 341, 187 S.W.2d 80 (1945) (prosecutrix' screams heard by bystander); McKee v. State, 118 Tex. Crim. 479, 42 S.W.2d 77 (1931) (defendant's voice as heard in jail).

236. Gleason v. Davis, 155 Tex. 467, 289 S.W.2d 228 (1956); Colbert v. Dallas Joint Stock Land Bank, 136 Tex. 268, 150 S.W.2d 771 (1941); City of Ingleside v. Stewart, 554 S.W.2d 939 (Tex. Civ. App.—Corpus Christi 1977, writ pending).

237. TEX. REV. CIV. STAT. ANN. art. 3731(a) (Vernon Supp. 1976-77) freely provides for authentication of public records and reports. This is the subject matter of FED. R. EVID. 901(b)(7).

238. The addition of 10 more years to the 20-year period provided in the federal rule brings it into conformity with Texas law. *See, e.g.*, Rio Bravo Oil Co. v. Staley Oil Co., 138 Tex. 198, 158 S.W.2d 293 (1942); Emory v. Bailey, 111 Tex. 337, 234 S.W. 660 (1921).

239. Edwards v. State, 551 S.W.2d 731 (Tex. Crim. App. 1977) (voice recordings); Hernandez v. State, 530 S.W.2d 563 (Tex. Crim. App. 1975) (spectograph analysis); Railroad Comm'n

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by Act of the Legislature or by other rules authoritatively prescribed by courts.

Rule 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Public documents.* The authenticity and admissibility of public documents, foreign, domestic and federal, sealed or unsealed, shall be proved in accordance with Article 3731(a), Vernon's Texas Statutes Annotated and also, when and as applicable, with Articles 3718-3722; Articles 3724-3726; Article 3726(b); Articles 3727-3731; Article 3731(b); Article 3731(c); or Article 3734(a); 3735; 3737; 3737(a); 3737(c), Vernon's Texas Statutes Annotated.²⁴⁰

(2) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.²⁴¹

(3) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.²⁴²

(4) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.²⁴³

(5) *Commercial paper.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

Comments

The Uniform Commercial Code as enacted in Texas provides for self-authentication of third party instruments, such as bills of lading and bailee receipts,²⁴⁴ negotiable instruments,²⁴⁵ and protests and notices of dishonor.²⁴⁶ The Texas Rules of Civil Procedure require a sworn denial of the execution "of any instrument in writing, upon which any pleading is found-

v. Southern Pac. Co., 468 S.W.2d 125 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.) (computers); TEX. REV. CIV. STAT. ANN. art. 3737(e), § 6 (Vernon Supp. 1976-77) (X-rays); TEX. REV. CIV. STAT. ANN. art. 6701(1)-(5) (Vernon 1977) (alcohol breath test).

240. These statutes, in varying degrees of importance and applicability, comprise the Texas law with respect to the authentication of public records and supersede FED. R. EVID. 902(1)-(5). The most important of these, and probably the only one necessary to this codification is TEX. REV. CIV. STAT. ANN. art. 3731(a) (Vernon Supp. 1976-77).

241. No Texas authority expressly supports or rejects FED. R. EVID. 902(6), but the likelihood of someone forging an entire newspaper or periodical for purposes of litigation is so remote that the rule would undoubtedly be adopted by any Texas court confronted with the problem.

242. FED. R. EVID. 902(7) is retained without express Texas authority for reasons similar to those expressed under rule 902(2).

243. FED. R. EVID. 902(8) is well supported by Texas statutory and case law. See TEX. REV. CIV. STAT. ANN. art. 3723 (Vernon 1926). See also Reed v. Beheler, 198 S.W.2d 625, 627 (Tex. Civ. App.—Fort Worth 1946, no writ) (an acknowledgement is "self-proving and needs no supporting evidence"); Stout v. Oliveira, 153 S.W.2d 590 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.) (acknowledgment creates prima facie case of fact of execution). But see Olschewske v. Smyth, 62 S.W.2d 220 (Tex. Civ. App.—El Paso 1933, no writ), which is not, however, thought to be authoritative.

244. TEX. BUS. & COMM. CODE ANN. § 1.202 (Tex. UCC Vernon 1975).

245. *Id.* § 3.307.

246. *Id.* § 3.510.

ed" and "of the genuineness of the endorsement or assignment of a written instrument upon which suit is brought by endorsee or assignee."²⁴⁷

(6) *Presumptions under Acts of Legislature.* Any signature, document, or other matter declared by Act of the Legislature to be presumptively or prima facie genuine or authentic.

Rule 903

SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless specifically required by legislation applicable to the type of writing in question.

Comments

The most common form of instrument requiring subscribing witnesses is a will and the Texas Probate Code provides a self-proving procedure for such documents.²⁴⁸ Other types of writings in which subscribing witnesses are commonly used, such as oil and gas division orders, releases, and some contracts are normally authenticated by the simple proceedings outlined in rule 901(b)(2). The final clause of rule 903 thus applies to a will that is not self-proving and in other areas, if any, where legislation requires the testimony of a subscribing witness.

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS [AND PHOTOGRAPHS]²⁴⁹

Rule 1001

DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

[(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.]

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. [An "original" of a photograph includes the negative or any print therefrom.] If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction,

247. TEX. R. CIV. P. 93(h), (i).

248. TEX. PROB. CODE ANN. § 59 (Vernon 1956).

249. References to photographs are bracketed in deference to Texas authority exempting photographs, including X-rays, from the best evidence rule. *Henriksen v. State*, 500 S.W.2d 491 (Tex. Crim. App. 1973) (best evidence rule applies only to documents and not to photographs); *Kollmorgan v. Scott*, 447 S.W.2d 236 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (X-rays are not subject to best evidence rule). The references to photographs are not totally deleted because of the logic of applying the same rules to photographs, including X-rays, as to writings and recordings.

or by other equivalent techniques which accurately reproduce the original.

Comments

The definitions contained herein concern layman's terms and obviously no Texas cases support them. They are useful, if not essential, to the remaining provisions of article X. The definition of "duplicate," insofar as it favors certain types of secondary evidence, is contrary to Texas common law which recognizes no hierarchy of secondary evidence.²⁵⁰ Important Texas statutes, however, do give priority to "any photographic, photostatic, microfilm or other process which accurately reproduces or forms a durable medium for so reproducing the original."²⁵¹

Rule 1002

REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, [or photograph,] the original writing, recording, [or photograph] is required, except as otherwise provided in these rules or by Act of the Legislature.

Comments

The best evidence rule embodied in Federal Rule 1002 has been seriously wounded in Texas by articles 3731(b) and 3731(c) of the Civil Statutes. Article 3731(b) applies to public and business records and admits reliable duplicates without qualification. Article 3731(c) applies to "a writing or written instrument" and admits such duplicates "where the party using the same, at the time of its offer in evidence either produces the original or reasonably accounts for its absence, or where there is no bona fide dispute as to its being an accurate reproduction of the original."²⁵² Thus, the common law best evidence rule is applicable only when the secondary evidence does not qualify under either statute or, with respect to private writings or written instruments, only in the absence of the circumstances set forth in article 3731(c). Insofar as it remains applicable, however, the common law best evidence rule as expressed in many Texas cases is consistent with the federal rule as set forth above.²⁵³

Rule 1003

ADMISSIBILITY OF DUPLICATES

A duplicate is admissible under and according to the provisions of Articles 3731(b) and 3731(c), Vernon's Texas Statutes Annotated.

Comments

Federal Rule 1003 admits a duplicate unless "(1) a genuine question is

250. *Aetna Ins. Co. v. Klein*, 160 Tex. 61, 325 S.W.2d 376 (1959); *Simpson Bank v. Smith*, 114 S.W. 445 (Tex. Civ. App. 1908, no writ).

251. TEX. REV. CIV. STAT. ANN. arts. 3731(b), (c) (Vernon Supp. 1976-77).

252. *Id.* art. 3731(c).

253. See, e.g., *Lumpkin v. State*, 524 S.W.2d 302 (Tex. Crim. App. 1975); *Clement v. Nacol*, 542 S.W.2d 265 (Tex. Civ. App.—Fort Worth 1976, no writ). In *Cage v. State*, 167 Tex. Crim. 355, 320 S.W.2d 364 (1958), the court recognized that the best evidence rule applies only when the contents of a writing are to be proved; thus, *the time* of the issuance of the permit was held not subject to the rule. This, of course, is consistent with the federal rule as stated.

raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit a duplicate in lieu of the original."²⁵⁴ The Texas statutes codified in rule 1003 accomplish approximately the same result, since the federal definition of a duplicate is substantially the same as that in the Texas statutes. Literally, the Texas statutes go further with respect to duplicates of public and business records because the admissibility of these is not dependent upon the absence of a genuine dispute over their authenticity. As a practical matter, however, if a genuine dispute were raised in Texas concerning a duplicate of a public or business record, and the original were available, the original would either be produced or the duplicate given no weight by the fact finder.

Rule 1004

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, [or photograph] is admissible if

- (1) *Originals lost or destroyed*. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.

Comments

Texas excuses compliance with the best evidence rule when the original is shown to have been legitimately destroyed²⁵⁵ or lost,²⁵⁶ assuming the destruction is not deliberate and unexplained.²⁵⁷ Even in this latter situation, if the deliberate destruction was not at the hands of the proponent of the evidence, the rule is inapplicable.²⁵⁸

- (2) *Original not obtainable*. No original can be obtained by any available judicial process or procedure.²⁵⁹

- (3) *Original in possession of opponent*. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing.²⁶⁰

- (4) *Collateral matters*. The writing, recording, or [photograph] is not closely related to a controlling issue.²⁶¹

254. FED. R. EVID. 1003.

255. *Utica Mutual Ins. Co. v. Bennett*, 492 S.W.2d 659 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

256. *Stucker v. Spindler*, 441 S.W.2d 303 (Tex. Civ. App.—El Paso 1969, no writ).

257. *Massie v. Hutcheson*, 270 S.W. 544 (Tex. Comm'n App. 1925, jdgmt adopted).

258. *Womack v. State*, 145 Tex. Crim. 551, 170 S.W.2d 478 (1943). In that case the rape victim, not the state, deliberately destroyed letters written to her by the defendant. Thus, she was allowed to testify as to their contents.

259. This excuse is also accepted in Texas. *Missouri K.T. Ry. v. Dillworth*, 95 Tex. 327, 67 S.W. 88 (1902); *Standard Nat'l Ins. Co. v. Bayless*, 338 S.W.2d 313 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.). Where the original is shown to be outside the jurisdiction of the court, no effort to obtain it need be shown. *See Haire v. State*, 118 Tex. Crim. 16, 39 S.W.2d 70 (1931).

260. *McConnell Constr. Co. v. Insurance Co.*, 428 S.W.2d 659 (Tex. 1968).

261. In Texas "[i]t is well settled . . . that evidence relating to a matter which does not form the foundation of a cause, or the defense thereto, but is collateral to the issue, does not properly fall within the best evidence rule . . ." *Freeman v. Commercial Union Assur. Co.*, 317 S.W.2d 563, 568 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.). *See also Bouknight v. Langdeau*, 333 S.W.2d 670 (Tex. Civ. App.—Austin 1959), *aff'd*, 162 Tex. 42, 344 S.W.2d 435 (1961).

Comment on Omission of Federal Rule 1005

Federal Rule 1005 exempts properly certified duplicates of public records from compliance with the best evidence rule. This is omitted here because it is fully covered by the provisions of rule 1003 which provide for the admissibility of duplicates of various public business and private documents in accordance with the provisions of articles 3731(b) and 3731(c) of the Civil Statutes.

Rule 1005

SUMMARIES

The contents of voluminous writings, recordings, [or photographs] which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.²⁶²

Rule 1006

TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, [or photographs] may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the non-production of the original.

Comments

Federal Rule 1007 is too obvious to require authority; in fact little authority is available since an argument contrary to this rule would be untenable and absurd. There is Texas authority implying that a party may not successfully enforce the best evidence rule after having admitted the accuracy of the secondary evidence involved.²⁶³

Rule 1007

FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents or writings, recordings [or photographs] under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, [or photograph] produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Comments

The first part of Federal Rule 1008 conforms to Texas law, which lets the judge make preliminary decisions concerning any objection under the best evidence rule.²⁶⁴ Texas authority is lacking for the second part of the federal

262. The provisions of FED. R. EVID. 1006 find full support in Texas. See, e.g., *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80 (Tex. 1976).

263. *Hoefling v. Hambleton*, 84 Tex. 517, 19 S.W. 689 (1892); *Mecaskey v. Bewley Mills*, 8 S.W.2d 688 (Tex. Civ. App.—Fort Worth 1928, writ diss'd).

264. *Spencer v. Levy*, 173 S.W. 550 (Tex. Civ. App.—Austin 1915, writ ref'd).

rule. This portion of the rule is retained, however, because it follows the general concept of jury trials and allows the jury to determine the ultimate issues in the case even if these issues also determine the admissibility of certain items of evidence. To provide otherwise would probably amount to a deprivation of the right of trial by jury guaranteed by the Texas Constitution.²⁶⁵

CONCLUSION

Unlike most areas of substantive law, which can be carefully researched in advance of trial, the rules of evidence must often be hastily applied by both trial lawyers and judges during the trial without an opportunity for research or reflection. Consequently, the field of evidence is one in which an authoritative codification is of particular assistance to both the bench and the bar. My ultimate purpose has been fulfilled only to the extent that this article represents a positive step in the direction of codifying the rules of evidence in Texas.

265. TEX. CONST. art. 1, § 15. One Texas court resolved a similar problem, in a case where the evidence at hand was admissible only upon establishing a conspiracy, in a manner indicated by this rule. The court left the ultimate decision as to the existence of the conspiracy up to the determination of the jury. *Rowley v. Braly*, 286 S.W. 241 (Tex. Civ. App.—Amarillo 1926, writ ref'd n.r.e.).